PERSONAL LIBERTY LAWS,

(Statutes of Massachusetts,)

AND

SLAVERY IN THE TERRITORIES,

(Case of Dred Scott.)

BY JOEL PARKER.

BOSTON:
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MEMORANDUM.—The following Letters were originally prepared for publication in the "Boston Journal."

The first part of the earliest letter was written, as it will be seen, in justification of the writer's course, in relation to the "Personal Liberty Laws," while acting as Chairman of the Commissioners on the Revision of the Statutes of Massachusetts; to which he thought it expedient to subjoin, very briefly, the expression of his personal opinions respecting those provisions of the statutes, with some other opinions serving to show that his was not a partisan opposition to them.

At that time he had not even the most remote intention of pursuing the discussion any farther. But the subsequent appearance of divers papers and paragraphs, in which other opinions were expressed, induced him to enter upon the discussion more in detail, in a series of papers which are now collected for the greater convenience of those who may desire to refer to them, or perchance for the inspection of some who had no opportunity to see them in the original publication.

If they may lead to more just views respecting the subjects discussed, the object of the writer will be attained.

J. P.

CAMBRIDGE, February 28, 1861.

PERSONAL LIBERTY LAWS.

Explanatory and Introductory.

To the Editor of the Boston Journal:—

The "Atlas and Bee" of the 21st inst., in its leading article respecting "The Address to the Citizens of Massachusetts," lately published, has this paragraph:—

"The name of Judge Parker on this list is very suggestive. How does it happen, it will be asked, that so distinguished a jurist, selected for his ability to revise the statutes of the State, should have permitted laws to remain on the statute book of Massachusetts which are in conflict with the constitution and laws of the United States? Of what use is it to subject the State to so large an expense in codifying the laws if such unconstitutional laws are to be allowed to continue in force, and that without either remonstrance or suggestion by the Commissioners? If it be said that the Commissioners themselves had not the power to change their character, had they believed them unconstitutional, they certainly would have recommended a change to the legislative committee, before whom they appeared for suggestions and explanations of their labors."

This is somewhat surprising, coming from that paper, the responsible editors of which must have known and understood that the Resolve of the legislature, under which the Commissioners acted, contained no provision authorizing them to judge respecting the constitutionality of the acts of the legislature, and that it was very clearly not expedient that they should transcend their duty in that particular.

Had they done so, and reported against the provisions of the "Personal Liberty Bill," which had been enacted by one legislature and amended by another, the burst of indignation which would have followed would have waked the echoes of Abington, and Lowell, and Worcester, even if it did not extend to Great Barrington itself.

But in their Introductory Report the Commissioners, after stating that they had sedulously avoided the introduction of their personal opinions respecting matters of expediency, but had considered it their duty to construct the several chapters according to what appeared to be the general policy of the legislature, as they found it expressed, added this clause, viz.: "*They have not deemed it a part of their duty to pass upon doubtful questions of constitutional law, the presumption being that all the statutes of the State are constitutional until the contrary appears.*" As Commissioners, they were not authorized to rebut the presumption, and determine what was or was not unconstitutional; but here is a reasonable indication of an opinion that there were some provisions which were at least of doubtful constitutionality; and if any member of the legislature had made inquiry to what provisions reference was thus made, he would doubtless have received a ready answer. But no one asked, and certainly further suggestion need not have been volunteered. The Commissioners had abundant evidence that there were divers gentlemen in the legislature who deemed themselves quite competent to the work of revision without their assistance.

It may be added that when chapter 144, which contains the provisions in relation to personal liberty was considered by the Committee of Revision, or by its sub committee, "Judge Parker" had no personal or official connection with

either; and when, upon the *compromise* between the two Houses, the report of the Committee of Revision was committed to the Commissioners for a report thereon, the limited submission did not include any consideration of the constitutionality of the matters contained in the statute book. Their duty then was mainly to classify the proposed amendments, and to ascertain how many of the *shall be's* which had been retained in the provisions incorporated from the Revised Statutes, should be struck out, in order to produce uniformity with the Commissioners' Fifth Part.

Moreover, the alteration of the statute in relation to the writ of habeas corpus, hereafter mentioned, so that it would issue to the sheriff requiring him to *take an alleged fugitive slave from the custody of the marshal who held him under process of the United States*, was made by the very legislature which considered the Commissioners' Report, after the Commissioners had closed their examinations; to wit, on the 21st of December, 1859. It was the last Act but one which was incorporated into the revision. So much for the responsibility of the Commissioners.

Perhaps it may not be amiss if I avail myself of this occasion, to state somewhat more in detail, the reasons which induce me to believe that several of the provisions of chapter 144 of the General Statutes are unconstitutional. These reasons were stated a few days since in a letter to a friend who had made inquiry upon the subject, as will appear by the following extract:—

"This subject came under my consideration while revising the statutes, although it was quite apparent that it was not the *duty* of the Commissioners, and as apparent that it was not *expedient* for them, to report their opinion against the constitutionality of provisions now found in chapter 144 of the General Statutes. My belief,

from examination at that time, and from subsequent consideration, is that there are constitutional objections to several sections of that chapter.

"Section 6 requires a judge of the State court to issue a writ of habeas corpus, commanding the sheriff to take into his custody any person restrained of his liberty, &c., unless he is held by certain officers of this State. Of course he is to take an alleged fugitive out of the custody of the United States marshal, who holds him under the process of the United States, and thereby to impede, and thus far to nullify, the laws of the United States. If the marshal resists the service, he is liable, under section 38, to be attached as for a contempt.

"Section 19 requires the judge, when a return is made showing that the party is claimed to be held to service or labor in another State, on the application of any party to the proceeding, to order a trial by jury, as to any facts stated in the return of the officer, or alleged; and to admit the person held in custody to bail; although the United States process requires the marshal to hold him, and to dispose of him in accordance with the laws of the United States. This section also discharges him, on the verdict of the jury, [in his favor,] from any return to the custody of the marshal. In this mode it takes the trial of all questions which may arise out of the jurisdiction of the United States.

"Section 21 changes the ordinary rules of evidence which would otherwise be applicable to such trial by jury, supposing that to be admissible, excluding the declarations, even the voluntary declarations, of the alleged fugitive, placing the burden of proof of every question of fact upon the claimant, requiring two witnesses, and excluding the very evidence which the Act of Congress allows as sufficient on the hearing before a United States officer, to show that the person owed labor or service.

"Section 58 provides for the appointment of commissioners to secure this extraordinary trial by jury.

"Section 62 punishes any person who assists in removing, or comes into the State with the intention of removing, or assisting in removing, any person who is not held to service, &c., on pretence that he is so held, or has escaped, &c. Unless the term 'pretence' is construed to mean fraudulent pretence, which is not a necessary construction, this section compels every one who aids, or comes with the intention of aiding, in the removal of a supposed fugitive, to judge, at the peril of the extreme punishment imposed by this section,

whether the party claimed is held, or has escaped. Its manifest tendency, and its undoubted intention, apparent on its face, is to deter any person from aiding in attempts to reclaim fugitives, and thus to hinder the execution of the fugitive slave law.

"Section 63 subjects any officer of the State, or member of the volunteer militia, who aids in arresting a person claimed, *or in returning one adjudged to be a fugitive*, to a severe punishment, and thus debars citizens of the United States from aiding in the execution of the laws of that government. The exemption from the penalties of this section of members of the volunteer militia who act in obedience to orders, does not obviate this objection.

"I do not perceive how the constitutionality of either of these sections is to be maintained so far as they apply to cases where there are legal proceedings for the reclamation of a fugitive slave, and it seems to be clear that some of them are not constitutional when applied to cases where the master attempts to reclaim his slave without process."

Farther consideration of the subject, since the letter above mentioned was written, has only served to confirm the opinions thus expressed; and I may add here, that it will not be an answer to say, that some of these provisions may have a constitutional application to other cases than those where a party claimed as a fugitive slave is in the custody of an officer of the United States, under process which commands the officer to hold him, and that they are not therefore wholly unconstitutional, because they may perhaps have a constitutional application to some case. Suppose, for instance, that a person under an alleged contract for labor and service to be rendered to him for the term of one year, imprisoned and detained the other party to the contract, in order to compel him to perform the service according to the contract, and that a habeas corpus was issued under the sixth section. It is not doubted that there would be nothing unconstitutional in taking such person out of the custody of

the party holding him, by means of the writ of habeas corpus, and bringing him before a judge, admitting him to bail, and trying the question of fact, if there was any one to be tried, by a jury. But no such case is on record, or likely to exist. Suppose, also, that the writ of habeas corpus might be used to take an alleged fugitive slave from the custody of a party claiming to be his master, who had pursued and captured him without process—which is by no means clear. But if that were admitted, the provisions which have been cited above were not enacted for such cases alone, nor mainly for that class. Prior to 1859, if the party alleged to be unlawfully detained was imprisoned or restrained by a marshal, deputy-marshal, or other like officer of the courts of the United States, the writ of habeas corpus was not to be issued commanding the sheriff to take the party into his custody, but the marshal, or other like officer, having the custody, was required to bring him before the judge of the State court, in order to an inquiry whether he was held lawfully. The alteration in 1859, by which in all cases, except where the party was in the custody of an officer of this State, the writ was to be issued requiring the sheriff to take him into custody, was a change, covering, and designed to cover and apply to, the very case of an alleged fugitive slave in the custody of the marshal, so as to take him out of that custody, and then admit him to bail, and to try all questions by a jury, under the State laws. The contemporaneous history will, I think, show clearly that the object of Massachusetts in 1855, was to hinder as far as possible the return of fugitive slaves. The excuse must be found in the great provocation, arising from the imprisonment of her colored seamen at the South, in the expulsion of the agents whom she sent to protect them, and in other

grievances and wrongs done to her citizens. If this excuse is not sufficient, it will not be to her honor to attempt to crawl off now, on an allegation that there are some cases to which some of the provisions of the personal liberty bill may be applied consistently with the Constitution and laws of the United States, and that those provisions must be taken to mean such cases. Even this cannot be said of all. Let us meet this question fairly, and dispose of it conscientiously, under our constitutional obligations.

And now, having said thus much, I am desirous of saying a few words more, notwithstanding a full comprehension that they are the words of one of those whom the "Springfield Republican" speaks of as, "those old Bourbons of Massachusetts," who "can scarcely govern more votes than the coats on their backs will cover;" and it may be added, of one who will be greatly satisfied if he can always cast the single vote which his coat covers so that it may subserve the best interests of the country. The words may furnish material for the consideration of others, which is the purpose for which they are offered. They seem to be appropriate accompaniments to the expression of these opinions respecting the personal liberty bill, and may be taken in connection with them.

It seems to me that all projects, at this time, for a convention to change the Constitution, or for constitutional amendments through the action of Congress, are not only unwise, but mischievous; because they have a tendency to excite hopes which cannot be realized. I am persuaded that an expectation of any amendment of the Constitution is vain and futile; and unsuccessful efforts to procure amendments will only excite greater animosity. The Constitution is well enough, if all parties perform their duties under it.

Any attempt in Congress to agree upon a new compromise line, if it might, by possibility, be successful, is only leaving the matter open to a speedy renewal of the controversies which have agitated the country since 1854, and is therefore to be avoided. What can be settled, had better be settled now; but we have had sufficient experience that a Congressional compromise line settles nothing. Congress can destroy it again, even if the supreme court cannot. The doctrine which has been promulgated by some of the incumbents of that bench, that the Constitution secures a right to carry slaves into the territories, and protects slavery there, is utterly indefensible. The question whether slavery shall be allowed or prohibited in the territories is a political question, except so far as it may be settled at the present time by some law which is within the control of Congress. And if the judges of the supreme court assume to control its introduction, under the pretence that the Constitution takes the matter out of the control of Congress, it will be mere usurpation.

There is one compromise which is practicable, and in my opinion but one. The Northern States may be induced to repeal all the provisions of their personal liberty bills which conflict with the Constitution of the United States, or with constitutional acts of Congress for the rendition of fugitive slaves, and they may permit such acts of Congress to be fairly executed, under the authority of the United States, without unlawful hindrance by their citizens. These things they ought to do under their constitutional obligations. This for one side of the compromise.

An act of Congress, having more regard to the possible rights of persons claimed as fugitives, and less offensive to the opinions and feelings of the communities where the law

is to be enforced, may be enacted ; and the question of the admission of slavery into the territories may be left to the action of Congress, which alone has, or with the present constitution can have, any rightful control over that subject. If Congress prohibits slavery in a territory, the people who inhabit it have no constitutional right to legalize it there ; for except by the authority of Congress, they have, while in a territorial existence, no right of legislation. If Congress admits slavery, and it is introduced under the protection of the law of Congress, no legislature, or judicial tribunal, can prohibit it. If Congress pleases to leave the matter to be settled by the inhabitants of the territory, no power is authorized to gainsay their conclusion. This may be the other side of the compromise at present. But after a few weeks more of violence and expulsion of the citizens of Northern States from States where the Constitution secures, or should secure, to them their rights as citizens of other States, this side of the compromise may require some additional guaranty, if any can be given, for the personal safety of citizens of the free States, who may peaceably, and without any violation of law, have occasion to visit some of the Southern States. Certainly if amendments of the Constitution were to be made, this subject could not be overlooked. There can be no question, that ultraism and violence at the South in and out of the halls of legislation, have done more to cause the feeling at the North, of which complaint is made, than all the arguments of the abolitionists. An appeal to the Northern States to perform their constitutional duties will not be in vain, when the Southern States abide by their constitutional obligations.

Furthermore, Congress has no power to interfere with slavery in the States. No man of ordinary common sense

asserts any such power. No guaranty is necessary respecting that.

Congress cannot prohibit the transportation of slaves from one State to another State, and so there is no occasion for constitutional amendments in relation to that subject. If the master takes his slaves into a free State, they may thereby become free under the laws of the State into which they are introduced, as they would be if sent to England. He must look to that.

If it may be supposed that regulations affecting a traffic in slaves, between the slave States, may be made under the constitutional power of Congress to regulate commerce between the States, it is not readily seen how that power can lawfully be exercised so as to do any essential mischief to the interests of the slave States, so long as they remain in the Union. The power must be exercised in relation to this subject, upon similar principles to those which will govern its exercise respecting other matters which form the subjects of commerce between the States. There is little or no legislation under this power at present, nor is there likely to be.

As to slavery in the District of Columbia, there will always be northern members of Congress enough who, like Mr. Lincoln, will refuse to abolish it, so long as Maryland and Virginia remain in the Union, and choose to continue slave States.

If a settlement of the existing questions now pending cannot be effected on the basis above indicated, those who love the Union, and desire its continuance, may as well accept the alternative, whatever that shall prove to be, at this time, as at any other.

Cambridge, December 25, 1860.

Personal Liberty Laws....No. 1.

The opinions which I expressed in my letter, published December 28, relative to the unconstitutionality of several sections of chapter 144 of the General Statutes, if those sections are to be understood and interpreted according to the obvious and ordinary meaning of the words in which they are expressed, and if they were intended to be applied to, and cover, the cases which come within the scope of their provisions, according to the language of the enactment, have not, so far as I am aware, been denied by any one. The language is certainly broad enough to include all cases of alleged fugitives from service or labor, as well as those where the supposed fugitive is in the custody of the marshal or some other United States officer, in virtue of process, under the provisions of the fugitive slave law, as those where he is arrested and held without process, by a private person. There is no exception of the former cases; and those are the cases which have occurred, and which led to the passage of the personal liberty laws. Cases of that character may be said to be the only cases which can be expected to occur hereafter; for it is not probable that any master will attempt the recovery of a fugitive slave here without legal process, or what he supposes to be legal process, for the purpose; and so far as mere kidnappers are concerned, the statutes as they existed prior to 1855 were supposed to be sufficient.

The obvious conclusion, then, would seem to be that these provisions are intended to operate precisely in accordance

with the terms in which the legislature has seen fit to clothe them, and which bring them into direct conflict with the Constitution and laws of the United States.

But notwithstanding the very broad terms in which they are expressed, it seems to be supposed that the constitutionality of these sections may be maintained upon the ground that, in and of themselves, they are well enough; that there is in the statute no conflict with the provision of the Constitution respecting the return of fugitive slaves, nor any conflict with any portion of the fugitive slave law; that the command in the writ of habeas corpus by which the sheriff is to take the custody of a party restrained, and the provision authorizing him to be admitted to bail, and requiring a trial by jury on demand of any person interested, do not apply to a case where an alleged fugitive is in the custody of the marshal of the United States, under process which requires that officer to hold him, because in such case the custody of the marshal being lawful, the sheriff cannot lawfully take the fugitive from that custody; wherefore the provisions of the State law are not to be construed as applying to such a case; and so of the other provisions respecting bail and the trial by jury. In other words, that in all cases where the State law cannot lawfully be enforced according to its terms, because of its conflict with the laws of the United States, it does not apply, and therefore it is constitutional. The reason why it cannot be enforced, and therefore does not apply, being, as I think, that it is unconstitutional.

Another view which is taken of the question is, that the fugitive being in the custody of the marshal, it is true that the sheriff cannot take him, and the State judge cannot take bail, or try the case; but that this results simply from the

fact that the arrest by the marshal is superior, because prior in time; and that although the State law is inoperative in such a case, this shows that there is no conflict, and so there is no unconstitutionality. The argument seems to be in effect, that the personal liberty law is in entire harmony with the constitutional provision, and with the laws of Congress respecting the rendition of fugitive slaves, because the national and State governments have co-ordinate jurisdiction, and where one has obtained the lawful custody of a person, or of property, for the purpose of legal inquiry into the right to hold the person, or into the title to the property, the person or property is thereby withdrawn from the corresponding jurisdiction of the other government until the investigation is completed; that this does not depend upon any supremacy or preference of one government over the other, but upon the naked question which first acquires jurisdiction of the subject matter to be determined; and that this view relieves the State statutes from all constitutional objections.

It is further argued that the section which provides for the punishment of a party who aids in the arrest of a person who is not a fugitive, on the pretence that he is such, applies only to a party who acts with an "unlawful intent," as well as does the unlawful act; and that the prohibitions upon the civil and military servants of the Commonwealth, apply only to acts done by them in their official and military capacities, and do not and were not intended to apply to acts done by them in their private capacity as citizens of the United States.

The argument, as above stated, is certainly ingenious. It evidently emanates from an acute legal mind. On a superficial consideration it may seem to have weight. As-

suredly if it has a just application to the provisions in chapter 144, to which exception has been taken, the objection that those provisions of the statute are unconstitutional, must be abandoned; for it is quite clear that there is a class of cases in which the sheriff or marshal, whichever first serves his process, will have the right to retain, as against the other, the custody of the person or property which he has lawfully seized under his process, although the other has process in his hands on which he could make a seizure but for the custody of the first. And this result is not from any special provision of law for that purpose in the statutes of either government; but because this priority of custody gives priority of jurisdiction to hold and dispose of the subject matter thus seized, according to the purpose for which it was seized; and this jurisdiction continues until that custody is lawfully terminated, under the law of the government by which it was taken. Thus, under the general laws of the United States, the marshal may attach property, upon a writ issued by a court of the United States, and, under the laws of the State, the sheriff, on a similar writ issuing from a State court, may attach property of the same defendant; but where one has, on his writ, seized personal property, the other cannot, by virtue of the writ in his hands, take that property out of the custody of the other. And so it would be in relation to an arrest of the body, if each writ contains a command for such arrest. This result is reached not from any special exception in the laws of either government, or in the command of the writ, but from priority of seizure, with a right to hold, which excludes a second seizure by another, acting in a different right.

Now if the laws of the United States, and the laws of the State on the subject in question, and the different processes

issued under those laws, were designed to effect the same purpose, to wit: the capture and return of the fugitive slave, the argument would have a much better application. Its fallacy, on this point, arises from the fact that there is no analogy whatever between proceedings for the arrest and return of a fugitive slave, and proceedings to set a man free from an unlawful imprisonment.

The duty of the United States, under the clause in the Constitution for the return of fugitives from service and labor, is to enact suitable provisions regulating the mode in which the claim shall be made, the examination had, and the return effected; which duty is single, confined to that subject; and the United States in the execution of that duty restrains personal liberty only for the purpose of a return. Over the exercise of this duty the State has no power. Assuming that all persons acting under the laws of the United States in this behalf proceed according to those laws, the State has no duty to perform respecting the case. The duty of the State which is brought in conflict with this duty of the United States, is to protect persons within the jurisdiction of the State from unlawful restraint; and for this purpose the State tribunals may inquire whether a person restrained of his liberty is rightfully so restrained. This duty is general in its character, having no particular reference to one kind of unlawful restraint more than another. In relation to fugitives, or alleged fugitives, from service, this duty of the State is not one of prevention from arrest. It cannot lawfully be exercised to prevent a fugitive from being arrested under the laws of the United States, or in anticipation or obstruction of the service of the process of the United States. It can never be performed, therefore, until the party is actually restrained of his liberty,

under a claim that he shall be returned. Even then, the duty is not to determine whether he is or is not a fugitive slave, but to inquire into the restraint, and ascertain whether it is lawful. If the restraint is found to be lawful under the claim, there is an end of the State jurisdiction over the case, whether the party claimed is or is not a fugitive. The State authorities cannot commence proceedings to enforce a return, under the laws of the United States, nor can they try the questions which arise in the proceedings under the fugitive slave law, except those questions which relate to their regularity.

It is quite apparent, therefore, that there is no co-ordinate jurisdiction. The question whether a party claimed as a fugitive is such, and therefore to be returned, is one of supremacy or preference, inasmuch as it is to be tried under and according to the laws of the United States. There is necessarily a priority of custody, under those laws, for all matters involved in the execution of the fugitive slave law; and the State tribunals cannot, under any State law, interfere to try a question of freedom or servitude, by a jury or otherwise, for the purpose of returning the fugitive, if found to be such; which is the very jurisdiction exercised by the courts and officers of the United States. In fewer words, the jurisdiction of the United States is for the return of fugitives; the jurisdiction of the State courts is for setting free persons unlawfully restrained of their liberty; and so far from being co-ordinate, these different jurisdictions, in relation to this subject matter, are, so far as they may be, antagonistic; that of the State being emphatically subordinate, as the latter cannot act upon the subject matter until the former has acted, nor then, if the proceedings of the former are regular.

These positions are stated with reference to the existing legislation, and do not intend to deny the right of a State, if it pleases, to exercise the extraordinary comity of passing laws to aid the master in reclaiming the fugitive, so that the claimant might act under the State law, instead of that of the United States. And they assume that the provision of the Constitution in relation to fugitives from service is to be enforced by the laws of the United States, and that the laws passed for that purpose are constitutional. If the question were open for contestation, it might well admit of argument that this constitutional provision is one to be executed by State authority, but that question is not an open one. Congress acted upon the constitutional provision as one to be enforced and executed under the authority of the United States, in 1793, when most of the framers of the Constitution were still alive, and some of them in Congress.

I am not aware that any objection was then made to this exercise of power, either in or out of Congress; nor was any heard of for many years afterward. The supreme court of the United States, and the supreme courts of this and other States, have sustained this interpretation, and the constitutionality of laws passed under it. If any thing of legal interpretation and construction can ever be regarded as settled, this must be so. There can be no stronger case Some judges of the supreme court of Wisconsin, a few years since, undertook to controvert it, but a better organization of the bench there has acquiesced in what seems now to be the uniform judicial construction.

In my next letter, I will consider the true intent and meaning of the "personal liberty law" of 1855, as derived not only from its terms, but from some of its antecedents.

Cambridge, January 14, 1861.

Personal Liberty Laws....No. 2.

Having shown that the jurisdiction of the State over cases where a fugitive from service is arrested under the acts of Congress, is not co-ordinate with, but subordinate to, the jurisdiction of the courts and officers of the United States, charged with the authority and duty to arrest and deliver the fugitive; I propose, in the next place, to ascertain the meaning and true construction of the sections of the "Personal Liberty Laws," to which objections have been made; not merely by the terms of the provisions themselves, but by the antecedents which led to their adoption; and thereby to show that they mean what they say,—were intended to apply to and cover the cases which fall within the terms in which they are expressed,—and that in such application they are in conflict with the Constitution and laws of the United States.

The importance of the subject at this time, and the difference of opinion upon it, will justify a more extended exposition than I should desire to make under other circumstances.

If we seek the remote causes which led to the passage of the Personal Liberty Bill of 1855, some of them will be found in a general aversion to slavery upon moral principles, and because of the unequal political advantages which, under the Constitution, it gives to the slave States; and in a particular indignation aroused by some of its results, as exemplified in the oppression of colored sea-

men in South Carolina and Louisiana, the shameful expulsion of Messrs. Hoar and Hubbard, who went to those States commissioned as agents of Massachusetts to protect the rights of such seamen by an appeal to the legal tribunals in their behalf, and in various other outrages upon the citizens of this and other free States, within slave States, on account of their opinions respecting the "peculiar institution."

The hostility to slavery, arising from these and other causes, found significant expression outside of the halls of legislation in 1842, and within them in 1843.

The Fugitive Slave Law of 1793 enacted that the claimant, or his agent or attorney, might seize or arrest the fugitive, and take him before any judge of the circuit or district courts of the United States residing or being within the State, or *before any magistrate of a county, city, or town corporate*, where the seizure or arrest was made; and upon proof, &c., it should be the duty of the judge or magistrate to give a certificate, which should be a sufficient warrant for removing the fugitive.

In 1837, Mr. Prigg, as attorney of Mrs. Ashmore of Maryland, having obtained a warrant from a justice of the peace in Pennsylvania, caused Margaret Morgan, a negro woman who was in Maryland a slave for life of Mrs. Ashmore, and who escaped to Pennsylvania in 1832, to be arrested by a constable. She was carried before a magistrate of the State, who refused to take cognizance of the case, and thereupon Prigg carried her and her children to Maryland, and delivered them to Mrs. Ashmore. For this, Prigg and others were indicted in Pennsylvania as kidnappers. The case was tried in 1839, and the jury found a special verdict, setting forth the facts and certain laws of

Pennsylvania bearing upon the case. Judgment was rendered, by agreement of counsel, against the defendants in the State court; and they brought a writ of error to the supreme court of the United States, for the purpose of having an authoritative adjudication upon the questions arising in the case. This is the famous case of *Prigg* vs. *Pennsylvania*, found in 16 Peters' Reports, 539, and so often referred to in discussions about the return of fugitive slaves. Seven judges delivered opinions; and there is about the usual amount of that diversity of views respecting the different points under consideration, which, for many years past, has caused the opinions of the judges of the supreme court of the United States to have very little weight, except as regards the precise point upon which the case is decided. The general opinion of the court was delivered by Mr. Justice Story. As summed up by Mr. Justice Wayne, it, among other things, recognized the right of the owner to arrest the fugitive without process, and held that no State law is constitutional which interferes with that right; that the legislation of Congress, upon the constitutional provision, as the supreme law of the land, excludes all State legislation upon the same subject; and that no State can pass any law or regulation to superadd to, control, qualify, or impede, a remedy enacted by Congress for the delivery of fugitive slaves, &c.

Toward the close of his opinion, Mr. Justice Wayne said: "Not a point has been decided in the cause now before this court which has not been ruled in the courts of Massachusetts, New York, and Pennsylvania, and in other State courts. Judges have differed as to some of them, but the courts of the States have announced all of them, with the consideration and solemnities of judicial conclusion. In

cases too, in which the decisions were appropriate, because the points were raised by the record."

Three judges were of opinion that the States might legislate in aid of the constitutional provision; but others held the power of Congress to be exclusive.

In the course of his opinion, Mr. Justice Story said: "The slave is not to be discharged from service or labor in consequence of any State law or regulation. Now certainly, without indulging in any nicety of criticism upon words, it may fairly and reasonably be said, that any State law or State regulation which interrupts, limits, delays, or postpones, the rights of the owner to the immediate possession of the slave, and the immediate command of his service and labor, operates, *pro tanto*, as a discharge of the slave therefrom." And speaking of the act of 1793, he remarked: "We hold the act to be clearly constitutional in all its leading provisions, and, indeed, with the exception of that part which confers authority upon State magistrates, to be free from reasonable doubt and difficulty, upon the grounds already stated. As to the authority so conferred upon State magistrates, while a difference of opinion has existed, and may still exist upon the point, in different States, whether State magistrates are bound to act under it; none is entertained by this court, that *State magistrates may, if they choose, exercise that authority, unless prohibited by State legislation.*" The clause which I have italicised has furnished the foundation of some of our State legislation. How far the foundation supports the superstructure we shall have occasion to consider.

The case was decided at the January term, 1842. It appears from the Life and Letters of Mr. Justice Story, that he regarded this decision as "a triumph of freedom."

In October, 1842, George Latimer was arrested in Boston as a fugitive slave, by constable Stratton, at the request of J. B. Gray, his master, a citizen of Virginia. He was brought before Mr. Justice Story in order to procure a certificate for his return, and the case being adjourned, he was placed in the custody of Mr. Coolidge, the keeper of the Suffolk jail, who used the jail for the purpose of detaining him. This use of the jail was objected to, and a writ of personal replevin sued out, but the jailer refused to receive the bond, or to discharge Latimer. A writ of habeas corpus was then procured, but Chief Justice Shaw, finding that the case was properly pending before the Judge of the circuit court, remanded Latimer to the custody of Coolidge, as the agent of Gray. A public meeting was called, "to provide additional safeguards for the protection of those claimed as fugitives from other States, or as slaves." One of the resolutions declared that the clause of the Constitution, "is not morally binding upon the American people, and should be disregarded by all who fear God and love righteousness." A Latimer journal was published, and resistance was urged in strong terms. A sermon was preached in Boston during the pendency of the proceedings, and afterwards published under the title, "The Covenant with Judas," of which the "Law Reporter," for March, 1843, said: "It is supposed to contain the very cream of the doctrine, that an oath to support the Constitution is not binding; and truly it does contain, with much other sophistry, such argument as has yet been devised, *in the pulpit*, to undermine the moral sense of the people, in the obligations of that oath."

It has not been uncommon, within the last few days, to see in the newspapers statements, that some of the leaders of the secessionists have repeatedly taken the oath to support

the Constitution of the United States, which oath they violate by their support of secession. If they should reply, that they trace the doctrine that the oath has no binding force to the teachings of a New England pulpit, what shall we answer?

Along with the new lessons to be learned, and the new adjustments which are perhaps to be made in our social and political system, it is devoutly to be hoped that a small class of New England clergymen will come to the understanding, that they are not serving the Lord when they denounce the constitution, weaken our reverence for law, and encourage resistance to this particular portion of it. The clause in the constitution, and the laws enacted under it, are not grievances which require to be redressed by revolution. We have a very poor opinion of the piety of the Rev. Doctors of Divinity at the south who are preaching secession so vigorously at the present time. Those at the north who preach *nullification*, serve the same master. Let me respectfully suggest to them that the judicial tribunals are much safer and better judges of constitutional and legal rights and obligations than they can possibly be.

The case of Latimer was terminated by the purchase of his freedom. I have adverted to a few, only, of the circumstances attending it, for the purpose of introducing the act of 1843 upon this subject, as the leading legislation of the Commonwealth in opposition to the execution of the law for the rendition of fugitives; the principle of which has since that time been greatly expanded.

Acting upon the implication contained in Mr. Justice Story's opinion, that State magistrates might be prohibited by State legislation from exercising authority under the act of 1793, the legislature in 1843 enacted, that no judge

of any court of record, and no justice of the peace, should take cognizance or grant a certificate, under the act of 1793, to any person who claims any other person as a fugitive slave within the jurisdiction of this Commonwealth; and that no sheriff, deputy-sheriff, coroner, constable, or jailer, or other officer of the Commonwealth, should arrest or detain any person, or aid in the arrest, or detention, or imprisonment, in any jail, &c., of any person, for the reason that he was claimed as a fugitive slave. The punishment was a fine not exceeding $1,000 and imprisonment not exceeding one year.

In another letter I will show how this opposition was enlarged into the act of 1855.

Cambridge, January 17, 1861.

Personal Liberty Laws....No. 3.

We know that the Fugitive Slave Law of September 18, 1850, as might have been expected, gave a fresh impulse to the anti-slavery feeling in Massachusetts. Believing the law to be constitutional, I have so said and so taught; but have at the same time declared that it contained provisions which ought not to have been there, and did not embrace one which it ought to have contained, to wit, a provision for a trial by jury in the place from which the alleged fugitive was supposed to have escaped. This would have assimilated it, so far as the difference of the cases admitted, to the provisions regarding fugitives from justice, to which, under the constitutional provision, it bears a strong analogy. Being constitutional, it is the law of the land; and those interested should be permitted to carry it into execution, by the aid of the authorities of the United States, without unlawful let or hindrance. In the constitutional convention in 1853, a reference having been made to this subject in a debate upon the judiciary, I expressed a hope that the people of Massachusetts would not place themselves in conflict with the authorities of the Union in regard to it. But in respect to personal aid, as a private citizen, I have to say that when the marshal requires me to help him chase a fugitive, he will receive my personal reply, upon my personal responsibility. The law is unnecessarily offensive, and I would not have voted for it, "come what, come might."

In 1851, a committee of the Senate, upon so much of the governor's address as related to slavery, made an elaborate report, accompanied by resolves and a bill "further to protect personal liberty," which contains the germ, pretty well developed, too, of the act afterward passed in 1855. It has been said, that "in approaching the consideration of these laws, we are to view them as enacted solely for the protection of personal freedom from unlawful restraint; and not, as seems by objectors to be taken for granted, as intended to impair or embarrass the exercise of the rights of slave-masters. And they are to be tested as designed for that end, and that only."

But if we find, on examination of their antecedents and accompaniments, that the latter intent is perfectly obvious; and if we perceive, on inspection of the acts themselves, that their language is perfectly consistent with the unlawful intent in which they appear to have had their origin, then they are to be construed according to their obvious meaning, as shown by the language used, and the intent which dictated it. I extract, therefore, a few short paragraphs from the report, to show that the design of the proposed legislation in 1851 was the protection of the fugitive slave, and not of the free citizen of the Commonwealth.

"Your committee cannot resist the conclusion that this law, (the act of 1850,) in its nature and design, is, in general, plainly hostile to the law of God, and to the design of all just human law. We regard the fugitive slave law, therefore, as morally—not legally, but morally—invalid and void; and though binding on the conduct, no more binding on the conscience of any man than a law would be which should command the people to enslave all the tall men or all the short men, and deliver them up on claim,

to be held in bondage forever; for the committee can see no moral difference between enslaving a white man and a black one, or a fugitive and one always free." * * *

"But the committee regard the fugitive slave law not only as unconstitutional *in general*, and with regard to its design, but *specially*, as compared with the Constitution itself." (And then follow specifications.)

"Considering this law as unjust in its nature, wrong in its principle, hostile to the design of all just human laws, deeming it in the highest degree unconstitutional, in general and in detail, we do not hesitate to declare that we consider it an infamous and wicked statute, a law not fit to be made and not fit to be kept." * * *

"Yet *it is a law of the land* not officially declared unconstitutional. Unconstitutional, as we believe it, inhuman and wicked, as it unquestionably is, *it is still a law*, and forcible resistance to it a legal misdemeanor. Its results are most disastrous." * * *

"The slave-hunter profanes the soil of Massachusetts, seeking whom he may devour. His presence spreads terror among the colored people of our State. He is a hawk among doves—a wolf, a hyena, among lambs." * * * *

"We confess we deem it no less a crime against nature and humanity to enslave a fugitive than to steal a free man. To our judgment, the *illegal* kidnapper on the coast of Africa, and the *legal* man-hunter in Boston belong to the same class of felons. They differ, however, *specifically*, and and we think the native species far worse than the foreign felon, whom all Christian governments, and our own among the number, have denounced as a pirate." * * *

"The committee have made careful inquiries as to what remedies for the present evils are in the power of the legis-

lature of Massachusetts, and what means we have for protecting the rights of our citizens against invasion by persons acting under the authority of the fugitive slave law." And they recommend the passage of the resolves and the bill reported by them.

Now two remarks are quite obvious from the report, of which the above are specimens, and from the bill which accompanied it. The first is, that these unmeasurable denunciations of the "man-hunter" are leveled against persons who come here to claim, by process of law, according to the laws of the State from which they come and according to the Constitution and laws of the United States, persons who have fled from their service; and not against persons who under pretence of such claim, or any other pretence, attempt to kidnap free citizens of this State. If we may judge from some of the language used, the committee would seem to have deemed the latter the lesser offence. They think "the *legal* man-hunter" "far worse than the foreign felon." The second is, that it is not within the ingenuity of man to deny, upon any plausible grounds, that the report, resolves, and bill, were all intended to be in direct antagonism to the legislation of Congress.

The bill was defeated in the Senate by a majority of three.

The case of Thomas Sims occurred in April, while the legislature was in session. If I had time and space, an attempt to count the numerous motions, writs, warrants, and other legal proceedings, which were resorted to in order to prevent his rendition, with a statement of the nature and operation of them, might be more amusing and instructive at this day, than the proceedings themselves were at the time when they occurred. Any one curious in such matters can consult the "Law Reporter" for May, 1851. There were

four or five applications for the favorite remedy of habeas corpus. Sims came into the State about a month before his arrest, escaping from Georgia by secreting himself on board a vessel, and escaping from the vessel, in the harbor, to the shore. It was not doubted that he was a fugitive slave; and it may serve to show what the declaimers respecting personal liberty mean when they talk about protecting the free citizens of the State from kidnappers, that this case of Sims was paraded in the Constitutional Convention, as one in which a "*free citizen of Massachusetts*" had been carried into slavery; and that the refusal of the State judges, on the return of the habeas corpus, to free him from the custody of the marshal, was urged as a reason why the tenure of the judicial office should be changed. "Now, sir," said the advocate for protection to the "free citizens," "I would like to have judges elected by the people that they may not be so independent of them; so that if another case upon the writ of habeas corpus, similar to the one to which I have referred, should come up before them, they will be dependent enough to listen favorably to argument, and be able to give equal protection to all, or better reasons for refusing it than were rendered in the case of Sims." The reason that Sims was held on legal process issued under the authority of the United States, and that the State judges could not liberate him without violating their oaths, was not a sufficient reason with this legislator; and there are others like him. If the judges will not discharge the "free citizens," they say, let us compel the courts to grant them a trial by a jury, who may "listen favorably to argument." This was one of the objects of the bill reported in 1851, and reproduced, with variations, in 1855.

A change in the political administration of the State in 1853 and 1854, gave comparative rest to the subject in the legislature. But in 1854 Anthony Burns was claimed as a fugitive from Virginia. Most of us have a general recollection, at least, of what happened at that time, and what happened afterwards, as some of the results, to the commissioner who sat in that case. His offence was, that, acting according to his convictions of his duty, he gave a certificate for the rendition of the peculiar "free citizen," Anthony Burns, and the friends of the peculiar free citizens bestirred themselves with great energy.

At the next session of the legislature petitions were presented from more than eight thousand persons on this subject. How many of them were women, and how many minors, is not very material. As one of the means of determining the uses and purposes of the legislation of 1855, let us read one of these petitions. They were nearly all in the same words, viz:

"The undersigned citizens of ——— respectfully ask you to declare that any person who engages in arresting, holding or returning a fugitive slave—either as United States judge, commissioner, marshal, deputy-marshal, or in any other capacity whatever, *or even as a private citizen*—shall be forever incapable of holding any office of trust, honor or emolument, whether such office be State, county, city or town office, unless relieved from such merited disgrace by pardon."

"And we also ask you to pass a law which shall punish with fine and imprisonment, any State, county, city or town officer, who shall, during his continuance in such office, aid, in any way, in arresting, holding or returning, a fugitive slave—*whether such acts are apparently done in virtue of his*

office or otherwise. And also to punish, by fine and imprisonment, any claimant of an alleged slave, or any aider or abettor of such claimant who shall attempt to remove such alleged slave from this State, without his *first having had a jury trial on the question of his slavery or freedom*."

I have italicised some parts, which serve to show the purposes of the petitioners, or rather of the managing spirits who prepared the petitions for circulation, in relation to certain matters upon which there is now an attempt to put a very different gloss.

The joint standing committee on Federal Relations, to whom these petitions were referred, along with divers other matters connected with the subject, reported a bill, " To protect the Rights and Liberties of the People of the Commonwealth of Massachusetts," which, after being amended, was passed by both houses. The Attorney-General advised Governor Gardner that some of its provisions were unconstitutional. The Governor vetoed it, and then it was enacted by the affirmative vote of two-thirds in each house.

In my next letter, I propose to offer some further suggestions and evidence respecting the true construction of this act, to be followed by an examination of the legislation of 1859 respecting the writ of habeas corpus.

Cambridge, January 22, 1861.

Personal Liberty Laws....No. 4.

I endeavored in my last, by adverting to some of the prominent points, to sketch briefly the development of the State legislation, in its hostility to slavery, from the act of 1843; which merely withheld the aid of the State in the enforcement of the fugitive slave law, by a denial of the services of State officers, who, according to its terms, might act officially under it, and by the denial of the use of State jails; to the act of 1855, which placed the State in direct antagonism to the enforcement of the law by the authorities of the United States.

Any one who will read the act of 1855, in the light of the facts which have been stated, showing its origin, cannot doubt that the danger to be provided for was that of the surrender of fugitive slaves, and not of the kidnapping of those who were really free citizens of the Commonwealth; and that the design of it was, among other things, to force a jury trial, if possible, in all cases of the arrest of fugitives, by the exercise of a "co-ordinate jurisdiction," in conflict with the jurisdiction of the United States, which first had possession of the case, and which alone could rightfully dispose of it on its merits; to subject all persons to severe punishment who should remove, or aid in removing, any person not a fugitive slave, under a claim that he was one, or who should aid in removing a fugitive under a claim of service by a party to whom it was not due, however honestly they might have acted; to prohibit all persons holding any office in the State from rendering any aid in

the removal of a fugitive, not only in their official capacities, but as citizens; and to prevent, as far as possible, the volunteer militia from acting to preserve the peace by the prevention of an attempt at a rescue.

The petitions may serve, among other things, to show that the jury trial, for which the act provides, was not designed merely to try the lawfulness of the detention, in a case where the master had made an arrest without process, but was expressly intended to try, in all cases, the question of his slavery or freedom.

They may serve also as evidence, that the word "*pretence*," in the seventh section of the act, (section 62 of chapter 144 General Statutes,) which in some connections may undoubtedly mean *false pretext*, is in this legislation used to signify "assumption," or "claim," which are legitimate meanings of the word "*pretence*." This is further shown by the fact that the greater portion of the section is taken *verbatim* from the 5th section of the bill reported in 1851; and that in that bill the word "*pretence*" is found in two other sections, where it evidently means, *show*, *appearance*, *assumption* or *claim*.

The argument that in order to subject any person to the penalty of that section, (supposing it to be constitutional,) it must appear that there was an unlawful intent to remove a party *known* not to be a fugitive from service or labor, is not, I think, to be sustained. No other criminal intent seems to be necessary, in order to constitute the offence, than the intent to do the act which is to be punished; that is, the intent to remove or assist in removing as a person "held to service or labor," one whose service or labor was not due "to the party making the claim." If service or labor was due from the person removed, but not due to the

party making the claim, then the person removing or assisting in removing, would thereby subject himself to punishment. It is saying in effect, if you will act in such matters, you shall act at the peril of this extreme punishment, if you make even a mistake.

There are cases where a statute imposes a penalty upon a person who *knowingly* does the thing forbidden. And there are others where there is an implication, that to constitute a crime the act must be done with a guilty knowledge. But it is respectfully submitted that this case is not of that class; and no lawyer would venture to assure a client, indicted under this section, that the jury, to whom the same legislature of 1855 designed to give some authority to decide, *at their discretion*, both the law and the fact, would so construe it as to require evidence of knowledge, or be content with such an opinion of the judge. If convicted by the jury, the court could not save the party convicted by any judicial finding that there was no unlawful intent, there being an intent to remove the person as a fugitive.

I am not disposed to deny that there must be an unlawful intent, in order to constitute an offence under this section of the statute. But what is that unlawful intent? It is an intent to do the thing which the section was designed to prevent; and most clearly it was designed to prevent the removal of a person who is not the slave of the claimant, on a claim that he is such. It is not essential, therefore, that the party removing, or assisting, should have knowledge that the person removed or attempted to be removed was not a slave, or was not the slave of the claimant. He must not act in the removal *unless he has knowledge that he is such slave*. If he does, he incurs the penalty, because it is not said, or implied, that he shall act with knowledge that

the claim is false. It is sufficient that he acts wilfully in depriving a party of his liberty on a claim which is not in fact well founded. The mistake in the argument that there must be knowledge that the person removed was not a slave, because an unlawful intent is necessary to constitute a crime, is not so much a mistake of the principle of law, as a mistake in the application of the principle to this class of cases. Unquestionably there must be an intent to remove the person *as one from whom service and labor is due*, and *this is the unlawful intent*, if it is not due. If the removal were by receiving and carrying him out of the State as a passenger by rail car, steam-boat, or stage coach, or in a private carriage, without knowledge that he was claimed and removed as a person from whom service or labor was due, then no penalty would be incurred.

We do not need the aid of the petitions to assure us that section 15 of the act of 1855, so far as it relates to civil officers, (which is section 63, of chapter 144, General Statutes,) was designed not merely to prohibit any civil officer within the State from acting in his official capacity in the arrest, imprisonment, detention, or return, of a fugitive, but that it was designed, in the language of the petition, to prohibit any such officer from acting "even as a private citizen." The general terms of the enactment cover other than official acts, and the section cannot be construed otherwise without rejecting material portions of it. In fact it was useless as a prohibition of official acts, for the act of 1843 prohibited the officers of the State from acting under the fugitive slave law of 1793, and the first section of the act of 1855 applied the provisions of the act of 1843 to the fugitive slave law of 1850, although that law did not profess to give any State officer power to act in the arrest or return

of a fugitive. Where, then, was the necessity of a further prohibition of official acts? What could the officers of the State do, officially, under any State law, in the arrest, detention, or return? But this is not all which shows that their aid as private citizens was to be prohibited. The section, after enumerating the sheriffs, deputy-sheriffs, jailers, coroners, constables, and police officers, (being careful to include the coroner, who might in certain contingencies act as sheriff,) and thus, by special designation, prohibiting officers who could act officially in arrests and imprisonments; proceeds to provide equally for the punishment by like fine and imprisonment, of any "*other officer of this Commonwealth;*" or any "*district, county, city or town officer,*" who shall arrest, imprison, *detain*, or *return*, or who shall "*aid* in arresting, imprisoning, *detaining*, or *returning*, any person, for the reason that he is claimed or *adjudged* to be a fugitive," &c. What official acts can the state treasurer or auditor, the county treasurer or register of deeds, the town clerk or assessors, or collectors of taxes, (to say nothing of fence viewers, surveyors of highways, and of lumber, and measurers of wood and bark,) perform in the arrest or rendition of fugitive slaves? But they are clearly within this part of the statute, and it is nugatory unless it embraces them with others, who, like them, cannot act officially in such cases. It is quite evident from all the circumstances attending the passage of this act, that this provision in relation to officers was based upon an assumption, that the State may forbid *all* its officers to interfere, *by way of aid*, "even as private citizens;" which is certainly a large amplification of Mr. Justice Story's remark, implying that a State might prohibit its officers from executing the powers which

the act of 1793 intended to confer upon a very limited number of them.

So in relation to the provision for punishing any officer or member of the volunteer militia who arrests, or aids in arresting, &c. What act can such officer or member do, officially, in arresting or imprisoning a fugitive? But the next section, (section 64, General Statutes,) providing that the volunteer militia shall not act in any manner, &c., was intended as a prohibition of the performance of military service, and thus shows that the provisions of the preceding section were intended to restrain aid as private citizens. Furthermore; that aid as private citizens is all the aid that is now prohibited under the section in relation to officers and members of the volunteer militia, is evident from the fact that section 65 of chapter 144, General Statutes, passed originally in 1858, exempts from the prohibitions of the statute all acts of military obedience and subordination. What acts, having any connection with the return of fugitive slaves, can the volunteer militia perform, *as militia*, except acts of military obedience? They may render aid with uniforms on, and guns in their hands, perhaps, but if they are not acting under orders their acts will not be the acts of the *militia*.

I might urge that certain sections of the act of 1855, which were repealed in 1858, serve to show the scope and intention of those which remain; but, waiving that argument, I will call one more witness, to wit: the Report of the joint committee which introduced the bill in 1855. The committee must be supposed to know what they meant in framing the bill; and the two Houses, with the printed report before them, may well be presumed, when they

adopted the language of the committee, to have adopted the sense in which the committee used it.

The report exhibits an elaborate attempt, by the citation of divers provisions of the Constitutions of the State and United States, and by the selection of paragraphs here and there from the opinions in *Prigg* vs. *Pennsylvania*, to give to the bill reported, the semblance of a constitutional enactment; at the same time that it shows a very determined purpose to manufacture a law which should nullify the execution of the fugitive slave law in Massachusetts.

The committee say, "Massachusetts stands second to no State in this Union in loyalty to the provisions of the Constitution of the United States." And again, "Massachusetts disclaims all intention of obstructing or evading any constitutional act of Congress." Following the first of the above extracts, however, we find: "But when she is asked to violate the fundamental principles of *that* Constitution as well as her own, she unhesitatingly throws herself back on her rights as an independent State. She cannot forget that she had an independent existence and a Constitution before the Union was formed. Her Constitution secured to every one of her citizens the right of *trial by jury*, and the privilege and benefit of the writ of habeas corpus, whenever their liberty was at stake. These essential elements of independence she has never bartered away. She will not suffer them to be wrested from her by any power upon earth." Farther on they say: "Your committee, therefore, are fully of the opinion that *every person living peaceably within the limits of the State*, and conforming to the laws of the State, is entitled to the protection of the State, and that the State is bound by her Constitution to give to *all her subjects*, whenever their liberty is imperilled, the benefit of the habeas

corpus and the *trial by jury*. And referring to the bill, they say among other things of certain sections, that they "are for securing the right of trial by jury, as well as of the writs of habeas corpus and of personal replevin." Again, "the seventh and eighth sections," (comprised in section 62, chapter 144,) "are intended to punish by fine and imprisonment *all those who shall be instrumental* in transmuting a freeman into a slave, whether by sending into slavery any man who has always been free, or by returning one who has escaped, either to a person other than the slave master from whom he escaped, or to any one to whom his service or labor is not due," &c. Again, "The ninth, thirteenth and fourteenth sections are for the purpose of *prohibiting Massachusetts officials of every kind from acting at all* for the return of fugitive slaves."

Who will longer doubt the design? Who will deny that the language of the enactment is adapted to its accomplishment?

The examination of the legislation of 1859, in relation to the writ of habeas corpus, must form part of another letter.

Cambridge, January 24, 1861.

Personal Liberty Laws....No. 5.

I proceed to the consideration of the legislation of 1859, in relation to the writ of habeas corpus. Prior to that time, when the party detained, and whose discharge was sought, was in the custody of the marshal, deputy marshal, or other like officers of the United States, the writ of habeas corpus was not issued to the sheriff, commanding him to take and bring in the body, but was issued to the officer holding the party in custody, commanding him to bring in his prisoner and to show the cause of his detention. The act of December 21, 1859, changed the law in relation to that class of cases, by authorizing or requiring the judge, or court, to issue a writ of habeas corpus, commanding the sheriff to take and bring in the body, and to summon the officer holding the party, to show cause.

In a late "Reading upon the Personal Liberty Laws," by a very distinguished jurist, it is assumed that the writ can no longer be directed to the marshal by reason of this change; and that this shows a mistake in the "Address to the citizens of Massachusetts" urging the repeal of the unconstitutional provisions. I am not disposed to argue that. We will suppose such to be the result. The change made by the act, then, is one by which the marshal can no longer be required to bring in the body of any person held by him, but the sheriff is required to *take* and bring in the person held by the marshal. Now it hardly needs an argument to show that it must have been intended that the sheriff

should do what he is thus commanded to do; that is to *take* the party out of the custody of the marshal into his own custody. No other change is made in this respect. All the requisition upon the marshal is to show cause why he claims to detain the prisoner. The provision applies to all cases where the United States officer has the custody.

But it is quite clear that the sheriff has no right to do what he is thus commanded to do, if the process in the hands of the marshal is lawful. This is now admitted, and must be admitted, because the Constitution and laws of the United States authorize and require the marshal to hold his prisoner, and that authority being superior, the legislature had no right to authorize the sheriff to do what he is under this change required to do. And this not merely because the marshal happened to have priority of custody, for it was supposed to be known, when the writ was applied for, that the marshal had the party in custody. The command is to take the party, notwithstanding that fact. The law must have been designedly altered for the very purpose of requiring the sheriff to violate that custody by *taking* the party. Is not the law, then, in its design, and in its effect if executed, in conflict with the law under which the marshal is required at the same time to retain the custody? What prevents its being executed according to its letter except this conflict? The conflict is not accidental, but of purpose. It is not one that exists in some unanticipated case. The antagonism presents itself in all cases to which the change was designed to apply, or can apply. The command is void, the sheriff is not bound to obey it, and cannot lawfully obey it, because of this antagonism, and this seems, beyond all peradventure, to prove the unconstitutionality of the change.

It will not be an answer to all this, to say that if the process under which the marshal holds his prisoner was not regularly issued, the sheriff may lawfully take the prisoner from the marshal, by virtue of his writ. Who shall judge whether the marshal's process is regular or not? Certainly not the sheriff. He cannot require the marshal to show his process, and if he could, has no power to try, or sit in judgment upon the question, whether it is or is not valid. That is the business of the court.

I should not have supposed it necessary to press this argument with such particularity had it not been argued that the law is constitutional, because if the party is in the lawful custody of the marshal, the sheriff will not attempt to take him, but will merely obey the other command of the writ, and summon the marshal to show cause. But why shall not the sheriff take the custody? Certainly not, because the statute does not purport to authorize it. Certainly not, because the writ does not in terms require it. The command to take the custody is quite as imperative as the command to summon the marshal. In fact, the latter command may be said to be only an incident to the taking of the custody by the sheriff, for otherwise the writ will lose its distinctive character, and will not be a writ of *habeas corpus*, but only a writ of summons to the marshal to show cause. It does not summon the marshal to bring in the body. Such are not its terms; the sheriff cannot require him to do so, and the marshal will not be in contempt if he does not bring his prisoner. What kind of a *habeas corpus* is that? Suppose, if you please, that, according to the decisions of the supreme court of the United States, when the writ from the state court commands the marshal to produce his prisoner, he is not bound to do so if the party is held

under lawful process, but is only bound to show cause. The marshal in neglecting to obey the requirement of the writ when directed to him, would do so under the peril of being in contempt, and of being punished, therefor, if it was found that his process was not regular. Whereas, under the present state of the statutes, if it is found that the prisoner is unlawfully detained, the court cannot set him free, because he is not there; and nobody is to blame for this result!

No person can have greater reason than I have to be assured of the folly and incompetency of the majority of the Legislature of 1859; but I freely acquit them of the superlative stupidity of intending to produce the change which they made on this subject, whether the old writ, directed to the marshal, may or may not still be issued. They escape the imputation of this stupidity, by the fact that they intended that the sheriff should obey the command and take the prisoner; and if they had had a constitutional right to make such a change, it would be the duty of the sheriff to serve the writ accordingly.

I have been informed, that although it may have been one of the motives which led to this change of the habeas corpus, to take a fugitive slave out of the custody of the marshal, and then admit him to bail, and to try all questions by a jury under the State law, it was not the motive or the exigency which led immediately to this legislation of 1859. It appears that the committee on the judiciary in the House reported a bill providing, that every person arrested or imprisoned by reason of the seventh section of the 98th chapter of the acts of Congress, approved 8th August, 1846, might, as of right, prosecute a habeas corpus, &c. This was amended so as to include any person arrested or imprisoned

under any act, resolve, or vote, of Congress, or either House thereof, and was thus passed and sent to the Senate, where the bill was amended by striking out the whole, and inserting a provision making this change, so that in case any party was held by the marshal, deputy marshal, or other like officer of the United States, the writ of habeas corpus should issue, commanding the sheriff to take him. In this form it was passed in the Senate and sent to the House, referred to the judiciary committee, and Increase Sumner of Great Barrington, from that committee, reported that "it ought to pass," which it did. As the member from Great Barrington has united in the Address in favor of the repeal of the laws which tend to interfere with the custody of the marshal, it is to be presumed that he has seen the error of his ways in this particular, and it is to be hoped that others will do likewise.

Now this change covered precisely the case of the fugitive slave, in the custody of the marshal, as well as if that was its whole object. But admit that another, and the main object of the change, was to take a recusant witness, who should be arrested on a *capias* issued by a United States court, or by Congress, or either House of Congress, out of the custody of the marshal or other officer who holds him under the process. If that process is lawful, this is just as much an unconstitutional exercise of power as the other—not concurrent, not co-ordinate, but brought into operation by the exercise, in the first instance, of the authority of the United States in making the arrest; and intended to be antagonistic to that arrest by and under the power of the United States. It will not make the legislation any the more constitutional, that it had two unconstitutional purposes in view instead of one. It is just as nugatory for the

one purpose as the other; for if the right of the United States court, or of either House of Congress, to issue the capias, is to be questioned, the sheriff cannot determine that question, and the State has not the right to violate the custody of the marshal, under his process, until the question is determined, and determined against the lawfulness of the arrest.

It is one of the evils of this anti-slavery crusade against the Constitution and laws of the United States, that by means of the "accursed eloquence," as it has justly been denominated, of the declaimers about the rights of "free citizens," meaning thereby the peculiar free citizens, we are in danger of being led to regard the government of the United States, not as our government, one of which we are citizens, and to which, as far as its powers extend, we owe a duty equal to, or it may be said superior, to that which we owe to our State government, for the reason that so far as its powers extend it is the superior government; but, on the contrary, we view it as a kind of foreign jurisdiction, to the tribunals and organs of which we are not to trust, and against which we are to erect bars of prohibition, by the interposition of antagonistic State authority. It is by the same process of reasoning respecting the tariff, that South Carolina has regarded the government of the Union in the same light. She is restive under one operation of the Constitution and laws of the Union. We are so under another. And thus the State organizations, which have been regarded as elements of stability and strength to a Republican Union, have become elements of weakness and disaster.

I claim thus to have maintained all that I asserted in my first letter respecting the unconstitutionality of the several provisions of chapter 144, General Statutes, and something

more. I have shown by incontrovertible proof, that the express intent and purpose of the act of 1855 was to delay, obstruct, and hinder, the execution of the fugitive slave law; that it is well adapted to the end designed; and that it does effect that object, if not by taking the fugitive from the custody of the marshal and trying all questions by a jury, by assuming so to order, and so to do. The act of 1859 is of the same character. And therein consists their unconstitutionality. If the provisions to which objection has been made, do not operate, legally, as an entire nullification of the fugitive slave law in this State, it is because they cannot be executed by the judicial tribunals, on account of their conflict with the laws of the United States. But the practical effect must be to prevent attempts to reclaim fugitive slaves, because of the embarrassments and obstructions which they purport to authorize, the penalties they denounce, and the anticipation of forcible resistance and defeat, which is encouraged in the forbidding, so far as is possible, the use of military force to prevent riot and bloodshed.

And now the question comes to us, as one of right and conscience: Ought not these provisions to be repealed?

I have been the more earnest in this exposition of their true character, because upon the action of the present legislature respecting this subject, may depend the question of the final dissolution of the Union.

This practical nullification is a wrong done to the slave States, excused, in some measure, as has been said, by the repeated outrages in those States upon citizens of the free States; but not thereby justified. This wrong is principally done to the border slave States, in which, comparatively, few of these outrages have been committed. The action of these border States will determine the question whether the

Union shall, or shall not, be dissolved. If they adhere to the Union, the attempt at secession by the cotton States, will, in all probability, be defeated, without any marching of armies, but by a reasonable attempt to execute the revenue laws, and by other appliances of a peaceable character; and they will be a wiser, and it is to be hoped, a better people. But if the border slave States unite in secession, coercion will be out of the question. The idea of a border warfare, along the whole frontier, from the Atlantic to Kansas, and the marching of invading armies from the North into the South, to reduce the people to subjection, is not to be entertained, even if the result might be submission. If the Union cannot be preserved but by a war of extermination, it is far better that it should be dissolved.

If we suppose that there is no danger that the border slave States will be drawn into secession, we deceive ourselves. It is true that the present industrial interests of the border States will not be promoted by a dissolution; but there are ambitious and reckless men there, particularly in Virginia, who are urging secession, and who may yet force those States into it, as like men have forced the cotton States into that measure. The consequence of such a dissolution would doubtless be the extinction of slavery in the border States at no very distant day, by the flight of slaves to the North and by their sale, in some haste, to the South, to prevent such an exodus. But the flight would give us a population which we do not desire, and would be the cause of quarrels and wars which would be to the advantage of neither side.

We may suppose that in case of a dissolution drawing the line between the slave and the free States, we shall be at a safe distance from this border warfare. Will it be honest, perhaps it may be asked, will it be assuredly safe, for us to

stand out in a refusal to repeal these offensive, unconstitutional laws, and leave the border free States to take their chance of the consequences of a dissolution? Will Pennsylvania be drawn to us by the cords of love if we thus expose her? Will Ohio, with all her free soil principles, thank us for a course which tends to give her a hostile frontier along her whole Southern border? I am assured that she has no "personal liberty law," notwithstanding all that has been said upon the subject. If she should be alienated, is the middle State confederacy, which has been threatend, so utterly impossible? In the event of a secession of the border slave States, would not the dread of a border warfare between the free and slave States justify them in any combination for their own protection, even if it were accomplished without much regard to the interests of any State which, by her persistent refusal to conform to her constitutional obligations, had contributed to the danger? Doubtless New England could exist by herself; but her interests will not be promoted by such separate nationality; and moreover, Massachusetts is not all of New England.

We may believe that such middle State confederacy cannot be organized, on account of a diversity of commercial and political interests; and I admit that it seems to be somewhat improbable, though not impossible. But there is another aspect in which the matter presents itself, which is open to no such objections. While I admit the constitutional right of the slave States to have a fair Fugitive Slave Law fairly executed, I shall endeavor in remaining letters to show that they have no right to have slavery introduced into the Territories; that the Constitution does not carry it there—the opinion of the six political judges of the supreme court to the contrary notwithstanding. Congress, however,

may allow its introduction. And if Pennsylvania and other border free States shall believe that Massachusetts is stolidly reposing "on her rights as an independent State," on which she so "unhesitatingly threw herself back" in 1855, and by her persistent refusal to repeal her obnoxious laws is interposing obstacles to an adjustment of existing difficulties; what shall hinder them from agreeing to the Crittenden—or, the Breckinridge—compromise, with strength enough in its support to overrule the opposition of Massachusetts and any other New England State that concurs in her policy. Such a compromise we know already receives large support in Pennsylvania.

And now let us, each and all, submit this question to our careful and dispassionate consideration. If we shall alienate other States now in sympathy with us, and thereby a compromise is made which permits the introduction of slavery into the Territories, present and to be acquired, will the retention of the Personal Liberty laws upon our statute book furnish to the country or to humanity a satisfactory equivalent?

Cambridge, January 28, 1861.

SLAVERY IN THE TERRITORIES.

No. 1.

The question respecting the admission of slavery into the Territories, is one upon which there is at present an "irrepressible conflict" *of opinion*, by reason of the belief which prevails, very extensively, among the people of the Southern States, that the Constitution secures to them the legal right to take their slaves into a territory, and that any act of Congress restricting the right to hold slaves in a territory is unconstitutional and void. And they derive their strong confidence in this belief from the opinions of a majority of the judges of the supreme court of the United States in the case of Dred Scott.

The idea that the Constitution secured the introduction of slavery into all the territories, seems to have had its origin in the fertile brain of Mr. Calhoun, and to have made its first appearance in 1847 or 1848. Prior to that time, so far as I am aware, it had not entered into the evil imagination of any one's heart to conceive such an absurdity.

If the Constitution gives such a right, the provision or provisions which confer it were clearly applicable to the territory north-west of the river Ohio, which was a territory of the United States on the adoption of the Constitution, and thus *it must have abrogated the famous ordinance of* 1787, *and have rendered nugatory any law of Congress restricting slavery in that territory;* and the applications of a portion of the people there for permission to introduce it, were alto-

gether unnecessary, and the refusals of Congress a humbug. For if the Constitution in one part of it carries slavery into the territories, the clause of the Constitution authorizing Congress to "make all *needful* rules and regulations respecting the territory, or other property of the United States," must be construed to be in harmony with such part, and thus not to limit or control it. Certainly it could not be "needful," or proper, to make a rule or regulation which would be in conflict with any right conferred by the Constitution. It would be preposterous to suppose that the Constitution, by a grant of power to make needful regulations, conferred upon Congress a right to destroy or nullify a portion of the Constitution itself.

So, again, if the Constitution gives such a constitutional right, as a legal right, which can be asserted and vindicated by the courts of the United States, all the agitation which convulsed the country respecting the admission of Missouri, the adoption of the Missouri compromise line, the acquiescence in it for so long a period, and the struggle respecting its formal repeal—can only be accounted for upon the supposition that the eminent statesmen of that period were but very sorry constitutional lawyers; for surely they had in 1820, occasion to subject the Constitution to a most rigorous examination in this respect.

The very fact that of all the great statesmen who framed the Constitution,—those who earnestly advocated it or as earnestly opposed it, and those who for half a century afterward administered the government in its legislative, executive and judicial departments,—no one had made the discovery of an interpretation of the Constitution which would put an end to all agitation respecting the extension of slavery; and which must settle also the right of the slave-holder to

take his slave into a free State and hold him there; would seem to furnish a conclusive argument against such a construction. I ought to say, however, that it is quite possible that the supreme court have got such an admonition upon the subject that they will not venture upon the experiment of deciding that the Constitution secures a right to the slaveholder to introduce slavery into a State where it is prohibited; but if we are saved from such a decision, it may perhaps be owing to the election of Mr. Lincoln and certain subsequent events. There is quite as good, and perhaps a better, semblance of reasoning for such an opinion than there is for a decision that an act of Congress prohibiting slavery in a territory is unconstitutional; and a half a century of uniform construction does not settle much in these days.

In the department of political and legal theorizing, Mr. Calhoun was a man of great enterprise; and the explorations of half a century, for the purpose of ascertaining the meaning and true construction of the great charter of American Union and government, did not deter him from claiming to have made new discoveries, which would subserve the purposes of his ambition. Many years since I heard that he said, when in college, that he would be President of the United States, or he would shake the government to its foundations. Whether he said it or not, he acted in strict accordance with the supposition of such an intention. Failing to accomplish his great purpose through the tariff and internal improvements, and failing to unite the South on nullification, so as thereby, if need should be, to organize a Southern Confederacy, he turned his attention to slavery, as a subject upon which, through Southern feeling, a union of the South might be accomplished, and the North be ren-

dered subservient; or the two sections be brought into collision, with a Southern Confederacy as the ultimate result. Such was the opinion of Mr. Benton, who had ample means for the formation of a sound judgment; and well known facts seem to warrant the conclusion. Mr. Calhoun did not live long enough to see the fruition of his hopes; but he sowed the dragon's teeth, and the seed, stimulated by the super-phosphates of six judges of the supreme court, and of Mr. Secretary Floyd, has at last sprung up in hosts of armed men, swearing allegiance to secession, and expecting, in the strength of their Almighty King Cotton, to go on conquering and to conquer.

Mr. Calhoun's first attempt to give to slavery a secure lodgment in the Territories seems to have come in the shape of a proposed Congressional enactment, extending the Constitution and certain acts of Congress over the Territories of California, New Mexico, and Utah, over which it was proposed to erect Territorial governments. Defeated in this, and evidently this was not enough, (because such an extension depended upon the will of Congress, which could not by any direct act of legislation extend the Constitution to places where it did not otherwise apply, and because the legislation of Congress asserting such a power of extension, could not be obtained,) we find very soon an assertion of the dogma, that the Constitution extended to the Territories of its own force and vigor, without any extension act, and that it carried with it protection to slavery there, because the owner of property has a right to go there with his property, and slaves are property. Mr. Webster met the doctrine at the threshold, and controverted it by conclusive arguments. He said: "The Constitution is extended over the United States, and nothing else. It cannot be extended over any

thing except the old States and the new States, which shall come in hereafter, when they do come in." Mr. Clay also denied it, saying: "Now, really, I must say that the idea that *eo instanti* upon the consummation of the treaty, the Constitution of the United States spread itself over the acquired territory, and carried with it the institution of slavery, is so irreconcilable with any comprehension or any reason which I possess, that I hardly know how to meet it." But he did meet it, and with a force of argument which might well convince any one but a predetermined disbeliever. Mr. Benton, and other distinguished politicians and jurists, utterly repudiated it. Something more was necessary in order to secure the object; and the next move seems to have been to make the supreme court a party to the measure, and by obtaining what appeared to be a judicial decision of the question, to quiet or overrule opposition to it.

It might perhaps be supposed that judges in the slave-holding States, surrounded by the excitement attending upon the subject, sympathizing with the advocates of the new doctrine, and having to some extent a community of interest with them, should, unless restrained by high judicial integrity and firmness, "listen favorably to argument." What influences induced a judge residing in a free State to make shipwreck of his judicial reputation, by uniting in such an attempt to control the legislation of Congress, is not so apparent. It is sufficient for our present purposes, that a majority of the judges appear to have been seduced into the belief that they had only to express their views upon the subject matter, in the shape and form of a judicial decision, and the controversy would be settled. If it had been a legal question, it would not have been necessary to settle it for the purpose of determining the whole case, so far as

Dred Scott and his family were concerned. But Mr. Justice Wayne told the story, in a single sentence of his opinion, when he said: "The case involves private rights of value, and constitutional principles of the highest importance, *about which there had become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision.*" Vain hope, infatuated belief, that their intervention could settle a contested political question. Evil was the hour; evil to the peace and harmony of the country; evil to the principles of constitutional law; evil to the character of the court; evil to the reputation of those who concurred in it; when six judges of the supreme court of the United States united in a sheer usurpation of the powers of Congress, and a gross perversion of legal principles; in an interpretation of the Constitution which has no warrant in its language, and which is in conflict with an unhesitating practical construction of half a century, by all the departments of the government.

If disunion takes place, it will be occasioned, in some measure at least, by this unhallowed interference of the judges of the supreme court with the great political question of the day; for it is quite clear that many and honest persons at the South rely upon these opinions to show that slave-holders have the right to carry their slaves into the territories, and to hold them there in servitude, not only irrespective of, but in defiance of, any legislation of Congress prohibiting slavery there; and they therefore believe, very sincerely, that the Republican party is attempting to deprive them of a constitutional and legal right. And the denial of such right, in the free States, constitutes, so far as the border slave States are concerned, the "irrepressible

conflict," if there be one, between them and the free States.

If the United States are dissevered, I trust we shall have the satisfaction, and it will not be a small one, of seeing the secession carry with it a portion at least of the political judges who by their unwarrantable interference have rendered the controversy between the different sections of the country, upon this subject, of more difficult adjustment. And it may serve as an admonition to those of them who remain, to confine themselves hereafter within the proper sphere of their judicial duties.

Let me not be misunderstood. I have in former letters referred to the judgments of the supreme court as matters of authority. Perhaps some one may ask, have you no respect for the opinions of the judges of a court whose judgments you cite as conclusive? I answer: No respect whatever for their opinions or judgments when the court transcends its jurisdiction, usurps the powers of another branch of the government, and perverts facts and legal principles to subserve political purposes.

A particular examination of some portions of the Dred Scott case, will justify this language, strong as it may appear to be.

Cambridge, February 4, 1861.

Slavery in the Territories....No. 2.

I do not propose to examine at large the demerits of the decision in the case of Dred Scott. The part of it which attracts present attention is that which assumes to determine, as a *legal conclusion*, that the Missouri Compromise of 1820, restricting the admission of slavery north of latitude 36° 30′, was unconstitutional and void; the reason being, that the Constitution extends over the Territories of the United States, and secures to slave-holders the right to enter the Territories with their slaves, and the right to hold them there in despite of any attempt at prohibition by Congress.

The determination of that question—even supposing it to be a legal question—was not only wholly unnecessary, but the effort to reach it was quite extraordinary. The majority of the judges held, that because Dred Scott was of African blood, and descended from slaves, he was not a citizen of the United States; that he could not therefore sue in the courts of the United States; and that the court in which the suit was commenced had no jurisdiction, for that reason. This settled the disposition to be made of that case and of any other suit which he might commence in the courts of the United States, and there was already a decision against him, in a suit for his freedom, in the supreme court of Missouri. Nothing farther was required to a final determination of his claim to freedom. It was certainly a strange proceeding, that the supreme court, without any necessity, should go farther under such circumstances.

Again, if the merits of the case had been regularly under consideration, the court might, on their own principles, have come to the conclusion that Scott and his children were not free, without any opinion respecting the constitutionality of the Missouri Compromise act. Scott had been held as a slave in Missouri. His master, Dr. Emerson, took him to Illinois and held him as a slave there. He then took him to Fort Snelling, west of the Mississippi, at that time part of the Wisconsin Territory, now part of Minnesota, where Scott married a negro woman held as a slave by another person; and Dr. Emerson afterward purchased her, and held Scott and his wife and child as slaves there, and took them thence to Missouri, holding them as slaves there. The six judges held that Scott was not free by reason of his having been taken to the free State of Illinois, because he did not claim his freedom while in that State. That having been held in Illinois as a slave, and carried back to Missouri, the laws of the latter State determined whether he was or was not a slave; and assuming to administer the laws of Missouri, and not those of the United States, they determined that his residence in Illinois did not operate to set him free. So had said a majority of the judges of the supreme court of Missouri. Now, by a similar process of reasoning, the six judges might have held, that the residence of Scott and his wife in the Territory was like his residence in Illinois in its operation upon the question of freedom; and that being actually held as slaves in the Territory, and then carried to Missouri, they were by the laws of Missouri still slaves. And this would have settled the whole case upon its merits, that is to say, its legal merits, in that tribunal. These circumstances serve to show that there was a determination to reach the question whether

Congress could prohibit slavery in the Territories, not because that was necessary to a full determination of the private rights of Dred Scott, but because, as was said by Mr. Justice Wayne, the case involved constitutional principles of the highest importance, "*about which there had become such a difference of opinion that the peace and harmony of the country required the settlement of them by judicial decision.*"

With this evidence before us that the judges not only went beyond what the case required, but went beyond what was necessary, on their own principles, to determine the case on its merits, it should surprise no one to find that the questions which they undertook to settle, because in their opinion "the peace and harmony of the country required the settlement of them by judicial decision," were political questions, with which the court had nothing to do. It is fairly to be inferred that such was the fact from the opinions themselves. If they are not to be characterized as good specimens of stump oratory, parts of them might form very respectable portions of a Congressional debate.* Mr. Justice

* Witness the following extract from the opinion of Mr. Justice Daniel:

"In this attempt there is asserted a power in Congress, whether from incentives of interest, ignorance, faction, partiality, or prejudice, to bestow upon a portion of the citizens of this nation that which is the common property and privilege of all—the power, in fine, of confiscation, in retribution for no offence, or, if an offence, for that of accidental locality only.

"It may be that, with respect to future cases, like the one now before the court, there is felt an assurance of the importance of such a pretension; still the fullest conviction of that result can impart to it no claim to forbearance, nor dispense with the duty of antipathy and disgust at its sinister aspect, whenever it may be seen to scowl upon the justice, the order, the tranquility, and fraternal feeling, which are the surest, nay the only means, of promoting or preserving the happiness and prosperity of the nation, and which were the great and efficient incentives to the formation of this government."

Campbell speaks flippantly of what is "thought their fort *by our adversaries;*" meaning thereby those who contend that Congress had a right to exclude slavery from the territories; including, it would seem, Mr. Webster and Mr. Clay, who had made speeches in Congress in favor of the right of restriction, and Justices McLean and Curtis, who dissented from the opinion of the court. I have no recollection of ever seeing a similar instance of partisanship by a judge, in delivering a judicial opinion; but I have seen many in Congressional debates, and the fair conclusion is, that "our adversaries" were our political adversaries. The judges of a legal tribunal, in delivering their judicial opinions, never have *adversaries.* Mr. Justice Catron speaks of "the question *of infraction of the* treaty" through which Louisiana was acquired, by a supposed act of Congress, drawing the line, north of which slavery should not exist, on the thirtieth degree, as a question upon which no one would doubt what the decision of the court would be; as if the infraction of a treaty by an act of Congress was a proper matter for the interference and control of the court. And he said "The Missouri Compromise Line was *very aggressive;*" leading to one of two inferences, to wit: either that he was discussing a political question, or that if the line had been somewhat farther north, the act might, *in a legal point of view*, have been constitutional.

But admit that the phraseology and general course of the opinions furnish only *prima facie* evidence that the question under the consideration of the court was a political question; the fact that the question of restriction had, from the time of its first agitation up to 1847, and for years afterwards, been considered a political matter, for the decision of Congress, might well be considered as determining its

true character by an unhesitating practical construction. This, however, seems not to have been enough for the six judges, and I propose now to follow out what they saw fit to treat as a legal question, to some of its legal results, as deduced from their opinions.

If the provision in the Constitution authorizing Congress to "make all needful rules and regulations respecting the territory or other property belonging to the United States," applies to territory acquired after the adoption of the Constitution, it would seem to settle the power of Congress in reference to this question; for in the absence of any constitutional restriction, limiting this clause, Congress must judge what rules and regulations were "*needful.*" The existence of slavery in some of the States, even if slaves were regarded as property, could not operate as a limitation upon this power. We find, accordingly, a most labored effort, in the "opinion of the court," to show that the clause does not apply to such after-acquired territory. For myself, I freely admit that it was not inserted in the Constitution with reference to any such territory, but my reason for this admission is altogether different from the reasons suggested by the court. My reason is, that the Constitution was made for the United States, as limited by the treaty of peace; that it looked to no acquisition of foreign territory—and of course contained no provision for the government of any such territory. And then it follows, "as the night the day," that the Constitution does not extend itself over any newly acquired foreign territory, nor can Congress extend it over such territory while it remains in a territorial condition. And it will follow, also, as an inevitable conclusion, that all questions respecting the government of such territory are political and not legal or judicial questions. "It

needs no ghost come from the grave" to assure us that a clause in the Constitution providing directly for the acquisition and government of farther territory, to be afterward admitted as States, would have most effectually secured the rejection of the Constitution; probably by the votes of all the New England States, as well as others. Besides, such provision, looking to the dismemberment of some foreign government, might have been justly regarded as offensive by Great Britain or Spain. But there are powers through which territory may be acquired, incidentally, although they were not inserted for that purpose. And when acquired, it is held by the sovereignty of the United States, as a nation, (not as a compact,) and the sovereignty or nation which holds it must provide for its government. The opinion of the court in Dred Scott's case admits this. (See 19 Howard's Reports, 448.) A better *authority*, however, to show that such may be the just conclusion, is found in 1 Peters' Supreme Court Reports, 542.

Some one may ask: "If this be so, how is it that new States are admitted, formed from such after-acquired territory; because, on that principle, the provision in the Constitution allowing the admission of new States cannot be construed as applying to new States formed from such territory?" The six judges assume, without reasoning, that the provision authorizing the admission of new States does apply to States formed out of such territory. But this is all a mistake, or a perversion. The Constitution containing no express provision for the acquisition of foreign territory, so that it is acquired only by the exercise of a power, broad enough to be sure, but not inserted for any such purpose; and there being no provision for the government of any such territory when acquired; it is preposterous to say that

the express provision for the admission of new States had reference to States to be formed out of territory which it was not proposed to obtain. And it can be conclusively shown that this constitutional provision for the admission of new States, had reference to States to be formed out of territory and out of States then within the limits of the United States. The discussion of that subject is foreign to the present purpose. But any competent investigator may find abundant proof, supporting this position, in the history of the adoption of the Constitution. And, without any inordinate vanity, I may claim to have shown the proof, in an "Address before the citizens of Cambridge, October 1, 1856."

It may be asked again, "How, then, are the States, formed from such territory, in the Union, and under the Constitution?" The answer is, that Congress has assumed the power to admit them, and the legislative department of the Union having admitted them, allowed them a representation, and extended the laws of the United States over them, with their assent, they are necessarily in the Union by the exercise of the authority which admits States; and they cannot be ousted. The Constitution is extended over them by the acts of admission, as it was extended over the States North-west of the Ohio, Vermont, and other States, within the limits of the United States, on their admission. The admission of Texas, which was never a territory of the United States, shows this. Any one who examines the history of the acquisition of Louisiana, and of the admission of the ungrateful State of that name, will see that Mr. Jefferson was clearly of opinion that an amendment of the Constitution was necessary in order to the admission of States outside of the original limits. But his

political friends showed him a practical way of amending the Constitution without the embarrassment of a formal addition to that instrument.

To return to the law of the territories, and to show farther that the question whether slavery shall be admitted is a political question, let us examine and see to what inevitable conclusions the doctrine of the six judges, that it is a legal question, settled by the Constitution, will lead us. In the "opinion of the Court," delivered by Mr. Chief Justice Taney, they say: "When the territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it *with its powers over the citizen strictly defined and limited by the Constitution*, from which it derives its own existence, and by virtue of which alone it continues to exist and to act as a government and sovereignty. *It has no power of any kind beyond it;* and it cannot, when it enters a territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the constitution. The territory being a part of the United States, the government and the citizen both enter under the authority of the constitution, *with their respective rights defined and marked out; and the Federal Government can exercise no power beyond what that instrument confers*, nor lawfully deny any right which it has reserved." * * *

"The *powers of the Government, and the rights of the citizen under it, are positive and practical regulations plainly written down.* The people of the United States have delegated to it certain enumerated powers and forbidden it to

exercise others. *It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have reserved. And if the constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive or judicial, has a right to draw such a distinction*, or deny to it the benefit of the provisions and guaranties which have been provided for the protection of private property against the enroachments of the Government."

"Now as we have already said in an earlier part of this opinion, upon a different point, *the right of property in a slave is distinctly and expressly affirmed in the constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States, in every State that might desire it, for twenty years.* And the Government, in express terms, is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words—too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection, than property of any other description. *The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.*

"Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from

holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void, &c."

I have made extended extracts in reference to this point, in order that the six judges may have the benefit of all the truisms contained in them; and I have italicized several sentences which I shall have occasion to refer to, in their bearing and operation upon the conclusion that the Constitution carries slavery into the territories. The reasons thus set forth, to show why Congress cannot prevent the introduction of slavery, have a further and marked significance in relation to the question: What power has Congress over it after it gets there?

But let us first inquire what this slavery is, which the Constitution, through the instrumentality of these six judges, introduces into a territory despite the prohibition of Congress? It is an *absolute power*, unmitigated, unrestrained and unregulated; power, without responsibility, on the part of the master; *absolute subjection*, unlimited, unprotected and unresistant—subjection without redress—on the part of the slave. In order to show this, I will not stop to consider what would be the relation of master and slave in a territory into which settlers had entered before any territorial government had been organized, as in the case of California; but take the case of a territory duly organized by act of Congress, and where, of course, there is a body of law existing for the government of the population. Suppose that Congress, believing the opinions of the six judges to be an attempt to usurp legislative power, and an infringement of the powers of Congress, inserts into the act for the organization of the territory a prohibition against

the existence of slavery there. The legislature of the territory, supposing it to have one, (which, however, is not a legal nor even a political necessity,) does not assume to pass any law regulating the relation of master and slave, which, according to the organic act, cannot have any existence there. The slave-owner enters with his slaves, the Constitution in his right hand, and the opinion of the six judges in the matter of Dred Scott in his left. Now I ask, with all due respect to the opinion of any body who entertains the supposition that there is a semblance of constitutional law in the opinion thus expressed, what law, or code of laws, is to determine the right and power of the master over his slave, and to regulate their exercise? There is nothing in the Constitution, which the slave-holder carries with him, which prescribes what he may do with his slave, or what he he shall forbear to do. The judges say that it authorizes him to take him there, and hold him as property. That is all. There is no law of Congress mitigating the servitude, or controlling the power of the master. Congress prohibited the existence of the slavery, but the prohibition is void. There is no statute of the territorial legislature restraining the passions of the master, regulating the service, limiting the subjection, or protecting the slave; for the legislative authority of the territory does not recognize the servitude. That is the beneficent office of the Constitution. The slave-holder does not, and cannot, carry with him the slave code of the State from which he emigrated, and which regulated his rights and duties while there. If he might, there would be as many slave codes in a single territory as there were States from which the slave-owners came, and the laws on that subject would soon be in inextricable confusion. The supreme court sent the slavery there, but it

may be presumed that there are some things that the supreme court cannot do. The six judges cannot compel Congress or the territorial legislature to enact a slave code for the territory; neither can they pass a law themselves to regulate the "peculiar institution" which they have introduced. After the decision in Scott's case, however, I ought, perhaps, to say this with some hesitation. The inevitable consequence is just what I have stated it to be. The right of property which the slave-holder carries with him into the territories, under such circumstances, is an absolute uncontrolled right, regulated and restrained by no law, and of course without responsibility to law. He may kill his slave whenever it suits his convenience, without any legal responsibility for the act; and he may eat him afterwards if it is his pleasure so to do. This is the constitutional right of the slave-holder, as fairly deduced from the opinions of the six judges. It is a consequence of their doctrine, from which they cannot escape. I do not state it too strongly. The decisions of the judicial tribunals in the slave States assume, as they must assume in general, that the local law, and that alone, *regulates* the relation of master and slave. And, treating the slave as property, in the absence of State legislation limiting and controlling the power of the master, his irresponsibility, even for the killing of his slave, has been emphatically and unhesitatingly asserted. It is true that in two early cases, one in Mississippi and one in Tennessee, it was held the killing of a slave might be murder, or manslaughter, at the common law. But the principle upon which these decisions were founded was examined and controverted in Georgia, and in that State, and in North and South Carolina, also, it is held that the common law is not applicable to slaves. Let the supreme

court of Georgia speak upon this subject, which they do in this language: "The civil rights of the master do not appertain to the slave; of these he can have none whatever." * * "It is absurd to talk about the common law being applicable to an institution which it would destroy." * * "Licensed to hold slave property, the Georgia planter held the slave as a chattel; and whence did he derive title? Either directly from the slave-trader, or from those who held under him, and he from the slave-captor in Africa. *The property in the slave in the planter, became thus just the property of the original captor. In the absence of any statutory limitation upon that property, he holds it as unqualifiedly as the first proprietor held it; and his title and the extent of his property were sanctioned by the usage of nations, which had grown into a law.*" * * "*There is no sensible account to be given of property in slaves here but this. What were, then, the rights of the African chief to the slave which he had captured in war? The slave was his, to sell, or to give, or to kill.*"—9 Georgia Reports, 579, 580—*Neal* v. *Farmer.*

And so it follows, logically, from the opinion of the six judges, that the barbarism of Africa is introduced into the territories of the United States, by the Constitution, and protected there. A more odious libel upon the Constitution cannot well be imagined. The iniquity of the usurpation through which it is promulgated, is only exceeded by the atrocity of the result.

But this is not all.

Cambridge, February 14, 1861.

Slavery in the Territories....No. 3.

Upon the hypothesis that the constitution, (there being no provision in it for the acquisition of foreign territory, and the formation of States out of such territory,) does not extend itself over territory acquired by conquest or by treaty, but that such territory is left to fall under the ordinary rules of public law, there is no difficulty respecting the regulation of slavery, or any other domestic institution or relation, there, while it is under a territorial organization. The laws of the country from which it was acquired, and which were in operation for the government of the inhabitants, remain in force until abrogated by Congress. If those laws prohibit slavery, it cannot subsist there until it is permitted. If they allow it, then it exists until forbidden, and it is regulated in the mean time by such rules as those laws prescribe for the limitation and restraint of the power of the master. And so of the other relations of life. The local courts remain for the administration of justice according to laws adapted to the wants of the inhabitants for the time being. Such alterations may be made upon the organization of the territory, and from time to time, as circumstances require. If the territory acquired is inhabited by Indians only, it may be supposed that no law of civilization exists there until it is introduced by the authority of Congress.

Suppose that, with a humble resignation to our "manifest destiny," we take another slice of Mexican territory, con-

taining a large population. There are laws already existing adapted to the existing civilization there. Any sudden introduction of the laws of the United States, without a change introducing the local municipal law of some State, also, would produce incongruity; for the laws of the United States are founded, to a considerable extent, upon the legislation of the different States, adopting the State laws as the basis of the national jurisprudence. And the immediate substitution of the municipal regulations of any one of the United States would compel the conquered inhabitants to transact their daily affairs according to principles which they did not comprehend; would provide for an administration of justice of the details of which they had no conception; and would subject them to penal consequences of which they could have no anticipation. Well, Congress, aware of all this, in its wisdom, organizes the territory by the appointment of a territorial governor, and with a few simple provisions conferring upon him certain power and authority, considers its present duty performed. But the six judges say that the constitution forthwith extends itself over this territory. Now I should like to know what the constitution is going to do with itself after it gets there. It can enact no laws, and it carries none with it, either National or State. It provides that the trial of crimes shall be by jury, but there is no law for summoning or organizing a jury, or directing the place of trial; and if twelve men could be got into a jury box, somewhere, they would have no sufficient knowledge what they were to do, or on what principles they were to do it. This may serve as an exemplification of the operation, in other respects, of this self-extended constitution; which was made for States and not for Territories. The six judges, referring to divers consti-

tutional provisions, specify several things which they say Congress could not do there, because forbidden by the constitution. Most of them are matters which Congress would have no temptation to do. Among them, it is said, — "Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding." Really! if the constitution does forthwith secure to the people of a conquered province the right to bear arms, it is certainly the most strange and wonderful constitution that was ever heard of. The proposition is pre-eminently preposterous. The denial of the right, and the disarming of the people, may be the very things which are necessary to prevent a revolt. How the people are to get a trial by jury until Congress provides for it, the six judges do not explain. And if Congress should make a law requiring a party accused to submit to a full examination, and thus compelling him, if guilty, to be a witness against himself; (which perhaps is not a very strange law to a foreigner, out of the British dominions,) until it shall please Congress to extend the jurisdiction of the supreme court over the territory, what are the six judges going to do about it. Are they quite clear that the constitution or laws of the United States will authorize the court to interfere, before any act of Congress provides for the exercise of their power, or for the organization of judicial tribunals in the territory? This illustration of their position that the constitution extends itself over the territory, furnishes very cogent evidence that the question is political and not judicial, and that their interference was wholly unwarrantable.

It may be objected that if the constitution is not extended over the territories, Congress can govern them by an arbi-

trary power;—that there is no restraint upon the exercise of its authority. The objection seems plausible, but it is theoretical, and not practical. Congress is the legislative department of the government, elected according to the constitutional safeguards. The legal presumption, (contradicted in some particular instances I admit,) is, that Congress is not made up of bullies and blackguards, and that the rights of the people inhabiting the territories may be safely entrusted to the guardianship of the national legislature, during the time of their territorial existence. Such has been the practical construction, from the necessity of the case, in the absence of a constitutional provision. No territorial government has been organized according to the requisitions of the constitution, supposing that instrument to extend over the territories. The act of 1804, erecting Louisiana into two territories, provided that the legislative powers should be vested in the governor, and in thirteen of the most discreet persons in the territory, to be called the legislative council, who should be appointed annually by the President of the United States, and whose legislative powers should extend to all rightful subjects of legislation, subject to certain limitations. It extended certain enumerated acts of Congress over the territory, and made provision that the laws in force in the territory, not inconsistent with the provisions of the act, should remain in force until altered or repealed by the legislature. This was the practical popular sovereignty in the territories under Mr. Jefferson's administration. The judges of the superior court were appointed for the term of four years, instead of good behavior.

It may be noted here, that in this earliest act for the organization of a territory outside of the original limits

of the United States, Congress regulated the introduction of slaves just as far as that body pleased, by provisions *prohibiting any person from bringing into the territory any slave from any place without the limits of the United States, or any slave from any place within the United States, if such slave had been imported since May* 1, 1798; and enacting that *no slaves should be introduced except by a citizen of the United States removing into the territory for actual settlement, and being at the time the bona fide owner, and that every slave brought in contrary to the provisions of the act should be entitled to, and receive, his freedom.*

The residue of the province of Louisiana, not embraced in the territory of Orleans, was called the district of Louisiana. And it was provided, that the executive power of the governor of the Indiana territory should extend to and be exercised in the district; and that the governor and judges of the Indiana territory, (who, by the by, were appointed for a term of four years,) should have power to establish inferior courts within the district, and prescribe their jurisdiction and duties, and to make all laws which they might deem conducive to the good government of the inhabitants. There were provisos that no law should be valid which should be inconsistent with the constitution and laws of the United States, and for securing certain rights to the inhabitants, but there was no recognition of a right to hold slaves in the district, nor any thing restraining the governor and judges from passing a law prohibiting entirely the introduction of slaves.

The territory of Florida was organized in 1822, in a manner similar to that of Orleans, as above stated.

The acts for the organization of the territories of Washington, Kansas, and Nebraska, in 1854, contain provisions

for the appointment of judges by the President, or President and Senate, who were to hold their offices for the term of four years, and until their successors were appointed. If the constitution extended itself over these territories, all the appointments of judges were in conflict with the provision of the constitution, that the judges, both of the supreme and inferior courts, shall hold their offices during good behavior.

Will the supreme court hold that the supposed judicial acts of all the judges appointed in these and other territories, have been void, because they were not appointed according to the constitution. Will they even decide that the judges were officers *de facto*, and so that their doings were valid so far as third persons were interested in them, but that the judges themselves were wrong-doers;—trespassers when by their process the property of any one was seized; and homicides when through their sentence any one has been hung; the execution being valid so far as the marshal was concerned who executed the sentence; but being a murder on the part of the judges, they not being judicial officers *de jure*.

These considerations may well lead us to the conclusion that where territory is acquired outside of the original limits of the United States, it may, and in some instances must, be governed outside of provisions of the constitution which were not intended for such a contingency. If we acquiesce in the acquisition of such territory, we may trust the members of the national legislature to provide for its government, in the exercise of their discretion, under their responsibility to their constituents and to the civilization of the age. Some things may be done unwisely. Party interests may lead to oppression, as in the case of Kansas; (in

which, however, the outrageous wrong was on the part of the Executive, and not by Congress;) but any attempt of the supreme court to interpose its judicial power for the government of such territory, instead of, and in opposition to, the will of the political power to which it rightfully belongs, will only be productive of much greater, because more wide spread, mischief. The court cannot provide for the administration of justice in such territory. Take again the case supposed of a further acquisition of territory from Mexico. The Mexican law forbids slavery. Congress has appointed a governor, and has not legislated farther. A slave-holder goes there with his slaves, and the alcalde, or other judicial officer, sets them free. Will the supreme court issue a *mandamus*, or sustain a writ of error for the reversal of the decree?

But let us examine this doctrine that the constitution carries slavery into a territory, and protects it there, in its application to a territory for which Congress has undertaken to provide a body of municipal law.

In all cases where slavery exists in a State, unless there is some constitutional provision regulating it, the State constitution, either in express or general terms, gives ample power to the legislative department to provide rules and regulations for limiting and controlling the power of the master. Every slave State has its slave code or laws for this purpose; and the absolute right, which, according to the decision in Georgia, would otherwise exist, is thus modified. But if the constitution of the United States extends over the territories, and carries slavery there and protects it, and if Congress legislates for the territories *under authority given by the constitution*, as the six judges assume that it does, there is no power in Congress, by its legislation, to limit and

control the power of the master, and any attempt so to do must be void. This is a legitimate result from the opinion of the court as delivered by Mr. Chief Justice Taney. That opinion, as we have seen, denies emphatically that the clause of the constitution empowering Congress to make rules and regulations respecting the territory or other property belonging to the United States, applies to the government of the territories. And the court say in other parts of the opinion, —"as there is no express regulation in the constitution defining the power which the General Government may exercise over the person or property of a citizen in a territory thus acquired, the court must necessarily look to the provisions and principles of the constitution, and its distribution of powers," &c. "What is the best form" [of organization] "must always depend on the condition of the territory at the time, and the choice of the mode must depend upon the exercise of a discretionary power by Congress, *acting within the scope of its constitutional authority*, and not infringing upon the rights of person or rights of property of the citizen who might go there to reside or for any other lawful purpose." "The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself." "It" [the Government,] "enters upon it" [the territory,] "with its powers over the citizen strictly defined and limited by the Constitution." "The Government and the citizen both enter it under the authority of the constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property beyond what that instrument confers," &c. I have cited some of these passages more at large in the previous number.

Now it is beyond question that the constitution confers no power, in terms, upon Congress to enact a slave code, or to provide any rules and regulations to limit the power of a master over his slave. It confers no power to legislate generally, except over the district which may become the seat of government, and places purchased for the erection of forts, magazines, &c., unless the clause respecting rules and regulations for the territory is applicable. Much less does it confer upon Congress any power to limit and control, or modify, any right conferred by the constitution itself.

I claim to have shown in my last letter that, upon the doctrine asserted by the six judges, the slave-holder who enters a territory where slavery is prohibited by act of Congress, enters with a constitutional right of absolute power over his slave. He cannot enter with any *smaller constitutional right*, by reason of any act of Congress which attempts to limit and control his rights. Will any one look at the grants of power to Congress, in the Constitution, and tell me which authorizes the enactment of slave codes for the territories ?

The same principle leads to the conclusion that the territorial legislature cannot limit the absolute power of the slave-holder. If the citizen enters the territory with his rights and privileges regulated and plainly defined by the Constitution ;—if the government enters upon it with its power strictly defined and limited ; if they both enter upon it with their respective rights defined and marked out ; and the government can exercise no power over his person or property beyond what that instrument confers ;—(all which is elaborately set forth in order effectually to secure the right, whatever it is, with which the citizen enters ;)—AND IF the right with which he enters, is, as we have seen it to

be, according to the principles of the six judges, the right of *absolute power over his slave as property*, assuredly there is nothing to be found in the constitution authorizing the territorial legislature to limit or control that constitutional right, either through any grant from Congress, or by any legislative power emanating from any popular sovereignty in the territory, for there can be none overriding, or overruling, the constitution. According to the opinions of the six judges, the constitutional right to enter the territory is an unqualified right, except so far as we may find in the constitution some *strictly defined* and *limited* power *marked out*, to modify and control it; and we find none. Even a general power of legislation, such as exists in relation to the District of Columbia, would hardly seem to be sufficient; but such a power is nowhere defined and marked out, for this purpose.

Nor is it readily perceived how the people of the territory, when they form a state government, can either abolish or control this constitutional slavery which has thus obtained a lodgment in the territory. They cannot by their constitution infringe upon a right guaranteed by the constitution of the United States.

Perhaps it may not be amiss to remark here, that upon the principles asserted by the six judges, this peculiar property possesses constitutional rights and privileges which no other species of property can claim; for the constitution does not recognize any right of property in horses, cattle, sheep, dogs, &c., nor contain any guarantees respecting such property; and the introduction of such animals into a territory may be prohibited, should Congress in its wisdom perceive any good reason for the prohibition. [Mr. Justice Daniel said, "that the only private property which the Con-

stitution has *specifically recognized*, and has imposed it as a direct obligation both on the States and on the Federal Government to protect and *enforce*, is the property of the master in his slave; no other right of property is placed upon the same high ground, nor shielded by a similar guaranty."]

But let us pursue the principles of the six judges in the case of Dred Scott to their legitimate consequences in another direction. Whether or not the constitution of the United States extends over the territories while under a territorial government, there is no question that it extends over all the states of the Union. Now if it be true that the constitution recognizes slaves as property, and therefore authorizes the owner to take them with him as property into a territory, and hold them there as slaves, against the prohibition of Congress, by the same reason he may take them to a free state, and hold them there as slaves, temporarily at least. It is not necessary to inquire what his rights may be if he voluntarily becomes a citizen of a free state. Entering the free state as a citizen of another state, with his slaves, for a temporary purpose, the six judges cannot hold, consistently with their principles, that the slaves become free; for if the constitution recognizes a right of property which is paramount to the laws of Congress, it must also, *thus far*, be a right paramount to the laws, and even to the constitution, of a state. "The citizens of each state shall be entitled to the privileges and immunities of citizens in the several states." "No person shall be deprived of life, liberty, or property, without due process of law," &c. This right of coming within the free states, with slaves, for a temporary purpose, and of passing through such states, is strenuously maintained by many southern politicians; and perhaps while I am writing the

supreme court are making up this very decision in the "Lemmon case," which occurred in the city of New York. Well, we have the slave-holder thus duly a resident, temporarily, in a free state, with his slaves, *as property*, under the protection of the constitution. Now suppose that while residing in or passing through the free state he kills one of his slaves, under such circumstances that deliberation and malice are clearly apparent. How shall the state's attorney proceed against him? Not under any law of the United States, for it has none adapted to the case, and the crime, if one has been committed, is not an offence against the United States. Not under any law of the state from which the master came, because, clearly, he did not bring a criminal code with him. No state executes the penal laws of another state. The free state in which the act was done has no slave code for the punishment of the slave master. These considerations furnish most cogent reasons not only against such a decision but against the admission of any amendment to the constitution allowing the holding of slaves even temporarily in a free state. As to fugitives it is the duty of the master upon the delivery to take the slave out of the free state immediately. In the case supposed, the course to be pursued is to indict the master under some statute punishing cruelty to animals, if there be such a statute, or else to indict for murder. But the mortal blow was dealt so dexterously, and the death followed so suddenly, that the ordinary characteristics of cruelty do not exist; and besides the state's attorney has been accustomed to regard a negro as a human being. So the grand jury, on his representation, indict for murder, the petit jury convict, and the court sentences the prisoner to be hung. But the six judges say that the slave was property,

and was held as such, under the protection of the constitution, up to the time of his death; that the killing manumitted him, to be sure, but not in season, through the manumission, to constitute the crime of murder, because the act of killing was begun and perfected upon property. And so the conclusion must be that the indictment, trial, and conviction, were all erroneous, and the party entitled to maintain a writ of error, in order to avail himself of the rights secured to him by the constitution.

But Georgia has shown us, in the case of Tassels, that there may be a practical abatement of the writ of error, by hanging the plaintiff in error before he can prosecute his writ!

It remains to examine the position of the six judges that the constitution recognizes slaves as property.

Cambridge, February 19, 1861.

Slavery in the Territories....No. 4.

Having proved, from the nature of the question itself, and by a brief reference to the history of the territories from the acquisition of Louisiana to the organization of Kansas in 1854, that the Constitution does not extend over the territories while in a territorial condition, and that they have uniformly been organized and governed, in important particulars, according to the discretion of Congress, and not in compliance with what the Constitution would require if it was the paramount law there; and having proved, farther, that the question whether slavery shall be allowed or prohibited in a territory is a political question for the determination of Congress, and not one of a judicial character to be settled by a court of law; I proceed in the third place, to show, that if the question was one of a purely legal character, the "opinion of the court" that the act of Congress for the restriction of slavery north of latitude 36° 30′, commonly called the Missouri compromise, was unconstitutional and void, is, as a legal conclusion, utterly indefensible, being founded upon a false assumption of fact, for which there is no reasonable excuse.

The elaborate arguments of the six judges, to show that the Constitution extends over the territories, are entirely unavailing for the extension of slavery there, unless it is also shown that there is something in the provisions of the Constitution which overrules and annuls any action of Congress to restrain the introduction of slavery.

The fact that the express and specific powers of legislation granted by the Constitution to Congress, comprise no power to prohibit slavery, will not suffice to show that the restriction is void; because it is evident that those express grants of power relate to the legislation of Congress which is to be operative within the States, and where of course the State authority provides for the local municipal legislation. It is quite clear that Congress possesses and exercises a power of legislation over the territories altogether beyond the limited grants of power which that body may exercise within the States. If it were not so, then there could be no code of general municipal law enacted for a territory; for Congress could not authorize a territorial legislature, supposing one to exist, to do what Congress could not do of itself directly. Or if the doctrine of popular sovereignty were admitted, so that Congress had nothing to do but to provide for the organization of the territory, leaving the people to form their own territorial institutions in their own way, subject to the provisions of the Constitution, it would follow that they might prohibit slavery, unless there is something in the Constitution which affirmatively authorizes the slave-holder to take his slaves there, and protect him in retaining them in slavery.

The six judges so understand it, and in "the opinion of the court" attempt to maintain the position that the Constitution does affirmatively secure the right, by asserting that upon the opening of a territory for settlement all citizens have a right to enter with their property, and that the Constitution recognizes slaves as property. The substance of their conclusions upon this part of the case is thus stated in the abstract prefixed to the report of the case, viz.:

"The territory thus acquired, is acquired by the people of the United States for their common and equal benefit, through their agent and trustee, the federal government."

"Congress have no right to prohibit the citizens of any particular State or States from taking up their home there, while it permits citizens of other States to do so. Nor has it a right to give privileges to one class of citizens which it refuses to another. The territory is acquired for their equal and common benefit—and if open to any, must be open to all upon equal and the same terms."

"*Every citizen has a right to take with him into the territory any article of property which the Constitution of the United States recognizes as property.*"

"*The Constitution of the United States recognizes slaves as property, and pledges the federal government to protect it.* And Congress cannot exercise any more authority over property of that description than it may constitutionally exercise over property of any other kind."

"*The act of Congress, therefore*, prohibiting a citizen of the United States from taking with him his slaves when he removes to the territory in question to reside, is an exercise of authority over private property which *is not warranted by the Constitution.*"

I have given the language of the abstract thus at large, that there may be no room for a supposition that there is any misapprehension respecting the actual doctrine of those who assumed to determine this matter. We have before us the premises, and the logical sequence through which they state their conclusion.

The suggestion that a restriction of slavery in a territory would violate the amendment to the Constitution which provides that no person shall be deprived of life, liberty, or

property, without due process of law; and the political disquisition of Mr. Justice Campbell to show that Congress does not possess the power of restraint, may serve adroitly to cover up the legal issue, but they have no just place in the case as grounds of judicial conclusion; and as they are not made the basis of the decision, they do not require a refutation.

It is hardly expedient to prolong this discussion by an argument to show, that however it might be admissible in a political debate, and by way of illustration, to speak of the Federal Government as the "agent and trustee" of the people, those terms are entirely inapplicable and unwarranted in describing the legal relations of the government and people. Nor shall I stop to show that the position, that "every citizen has a right to take with him into the territory any article of property which the Constitution of the United States recognizes as property," is utterly without any foundation as a legal principle. The Constitution does not so say, and there is no principle of public law which supports the proposition.

But I propose to demonstrate, beyond the possibility of a fair denial, that the Constitution does not recognize slaves as property; and that the whole foundation of the opinion, assuming the question to be a legal one, fails for this reason. In point of fact the absence of any such recognition in the Constitution is so palpable, upon an inspection of that instrument, that one cannot but marvel at the judicial confidence with which its existence is assumed.

Let us look at this matter a little more closely. There are three provisions in the Constitution which undoubtedly have reference to slavery, and where we understand that rights are recognized, as dependent upon its existence. In

neither of them is the term *slave* used. There is no inference, therefore, of a right of property, to be derived from the use of a word which, it might be argued, denotes or describes property. On the contrary, in each instance, the Constitution in referring to the slaves speaks of them as "persons," and not as property, and in neither of them does the subject matter imply that there is a property in the persons thus mentioned. In fact, in each instance, they are spoken of, either in connection with other *persons*, as having a personal *status*, or with capacities which do not belong to property.

The first instance in which any reference is had to slaves or slavery, is the provision that "Representation and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons." The part of this provision which refers to the slaves neither expresses nor implies the idea of property, either by its words, its object, or its connection with the other branches of the clause. The words are, "three-fifths of all other *persons*." Unless slaves are persons, they are not embraced in it. Persons bound to service for an indefinite time, dependent upon a contingency, seem to be embraced in it, but such persons are not property. So of persons bound to serve for the life of a third person. And persons bound to service during their own lives, are by no means necessarily so, even admitting that they may have that character. The object of the provision is to establish a basis upon which representatives and taxes are to be apportioned among the States, and that basis

is clearly *persons*, and not property. The other branches of the sentence, with which this part is in connection, relate to *persons*, and not to property. This clause, therefore, standing by itself, not only has no tendency whatever to a recognition of slaves as property, but furnishes an argument to show that the Constitution intentionally repudiated that idea, for otherwise they might at least have been designated as slaves, without circumlocution. This clause is not cited in the opinion of the court as a recognition of property.

The second instance of a provision having direct reference to slavery, is this: "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress, prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person." Here again there is no recognition of property, even by implication, but the reverse. It would have been more direct, to have said that slaves might be imported. The inference to be drawn from its omission, shows a determination not to recognize slavery by the use of the term which ordinarily designates the relation. Circumlocution is resorted to in order to avoid it. The subject matter of the migration or importation is "persons;" twice so designated; the further characteristics are not stated, unless it should be said that "migration" is not an ordinary characteristic of property. Some animals *ferœ naturæ* have migratory habits, but the law does not recognize property in them. And yet this is one of the clauses cited, as we have seen, in the "opinion of the court," to show that the right of property in a slave is *distinctly and expressly affirmed* in the Constitution. And it is added, "The right

to traffic in it, like an ordinary article of merchandise and property, was *guaranteed to the citizens* of the United States, in every State that might desire it, for twenty years." This is an utter perversion of the terms and spirit of the provision, and of the well-known history of its introduction. It was introduced, on the allegation of some of the members of the convention from South Carolina and Georgia, that those States would not ratify the Constitution, unless some provision was inserted restraining Congress from prohibiting the introduction of slaves; the powers about to be granted to Congress, being broad enough for that purpose, if left unrestricted. It was quite well understood that the slave trade, whether "slavery" did or did not imply "property," was abhorred by the great majority of the people, for which reason it was feared that Congress, if at liberty, would prohibit it forthwith. The threats of a refusal to ratify produced a mere agreement not to interfere, for a term of years, with such action as any State might take on the subject. The scope of the provision shows that the subject matter was regarded with disfavor by the majority; that it was admitted to save the Constitution; that it recognized nothing except a restraint upon the power of Congress in that particular; without assuming to give any legal character whatever to any traffic, or to the subject matter of any traffic, which might be prosecuted or produced during the time of the restraint. To call this a *guaranty* of the right to traffic is not a legitimate use of the term. If England and France had, within the time, denounced the traffic as piracy, and captured the vessels engaged in it, there is nothing in this provision which would show that Congress was bound to interpose and object.

The third provision having a special reference to slavery, is the fugitive slave clause. "No person held to service or labor in one State, under the laws thereof, and escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up, on claim of the party to whom such service or labor may be due." This provision is cited in the opinion of the court as distinctly and expressly affirming the right of property in a slave; and it is added, that "the government in express terms is pledged to protect it in all future time, if the slave escapes from his owner." Now it is hardly necessary to say that there is nothing whatever in this clause recognizing *property* in a slave, and nothing pledging the government to protect any such property. The clause recognizes the existence of the fact that in some States *persons* are held to service and labor, from which they may escape, and provides that they shall not be discharged from it by the laws of the State to which they escape, but shall be delivered up. Here, again, so far as the Constitution indicates any thing upon the subject, it is adverse to the idea of *property* in the master. The framers of the Constitution understood the right use of words, and would never have spoken of labor and service as being "*due*" *from property*. Whether it is *due* to one person from another *person* through force or contract,—by reason of a "patriarchal relation," or by apprenticeship, or peonage—and what is the extent and requirement of the servitude, the Constitution in no way indicates. We know that it had reference to slavery, but for the rights of the master and the obligations of the slave, we must seek elsewhere. The Constitution has no recognition upon that